Slow-Baked, Flash-Fried, Not to be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond

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I. INTRODUCTION

In 1984, Professor Amy Kastely published her article entitled *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody.*[1] Kastely reviewed decisions of Hawai'i's appellate courts to paint the evolving landscape of family law in this state. Her review went beyond a still-life portrayal of the law as it existed in the early-1980's. It also presented a joyride of ideas, a few of which have been recited so often in the intervening thirteen years that younger family law practitioners today might take them for granted.

One such idea is that marriage is "a joint effort, to which each party contributes his financial resources and personal efforts."[2] The concept envisions marriage as a partnership in which each spouse contributes both services and property.[3] It also provides a premise for distributing property should the partnership dissolve.[4]

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[1] *See* 6 U. HAW. L. REV. 381 (1984). I first came across Professor Kastely's article on the eve of my first contested custody case in 1986. A copy of the essay was left in the top drawer of the desk I inherited from another Legal Aid attorney. The discovery was entirely fortuitous and at the time I considered the article to be a godsend. I have since reread it a number of times and continue to find guidance eleven years later.

[2] *Id.* at 391.

[3] *See id.* at 390.

[4] *See id.* at 390. Professor Kastely tied the marital partnership model to community property states. *See id.* at 390 n.52. Community property states begin with the presumption that all earnings from spousal labor during the marriage are the property of the marital "community" or partnership in which each spouse has an undivided one-half interest. Consistent with this notion, property acquired with spousal earnings is also owned equally by both spouses

An egalitarianism underlies this concept of partnership.[5] It assumes that all spousal contributions, whether they come in the form of earning wages, maintaining the household, or providing care to children or other dependent family members, are equally valuable to the vitality of the marital partnership.[6] It promotes a gender neutral assignment and sharing of roles and responsibilities. It recognizes that contributions not only have their own inherent value, but also gain value in how they allow the other spouse to pursue activities that enhance the partnership.[7] It promotes a conceptualiza-

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regardless of whose earnings were responsible for the acquisition. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 53-55 (1985). Professor Kastely also noted that commentators for equitable distribution systems, like Hawai'i, were already endorsing the partnership model. *See* Kastely, *supra* note 1, at 390 n.52.

[5] *See* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119 (1993). One could argue that the concept of partnership has been with us for a long time although this may not be obvious at first blush. At the start of this country's history, for example, it was still widely held that upon marriage, the legal identity of the woman dissolved into her husband's. Further, the property brought into marriage by the woman belonged to and came under the control of her husband. The "disappearance" of a legal identity, however, belied the fact that women continued to have a vital role in both the marital unit and family, and could expect certain important obligations from her husband. While it was clear she was chiefly responsible for maintaining the domicile and that her role was to provide service, she and her children could expect financial support. Each spouse had clearly defined *de facto* roles: he supported, she served, and it was a division of labor upon which the function of the family, and even the community-at-large depended.

This could be characterized as a partnership in which each spouse made contributions and reaped benefits. The difference between our present day concept of a marital partnership and the earlier concept is that the latter was not equal and sought no ideal of equality. Earlier marital partnerships could generally be considered "symmetrical" (i.e., "he supported, she served") at best.

[6] *See* Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 199 (1987).

[7] *See id. See also* Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L. Q. 93, 104 (1997). For example, in a marital partnership where the couple agrees that the husband works while the wife remains at home to care for the home and children, no one could dispute the inherent value of the wife's in-home contributions. But another dimension to the value of such contributions is in how they give the husband the freedom to work and flourish in the marketplace. By developing the expertise and track record to advance, the husband is in a position to bring even greater contributions to the marital partnership and family unit. Some commentators label this enhanced ability to earn higher incomes and seek advancement as "human capital" attributable to the marital enterprise. *See, e.g.*, Cynthia Starnes, *Applications of a Contemporary Partnership Model for Divorce*, 8 B.Y.U. J. PUB. L. 107, 112 (1993).

This idea is usually given much more attention during divorce proceedings when the stay-at-home spouse seeks to recapture her "investment" in the course of seeking an equitable property division and support award. *See, e.g., Cassiday v. Cassiday*, 68 Haw. 383, 716 P.2d 1133 (1986), a pivotal Hawai'i case in which the wife sought an award that adequately reflected the

tion of marriage in which each spouse seeks to contribute to the communal good with the goal of securing joint comfort, safety, and prosperity. It also entitles each spouse to an equitable, if not equal, sharing of the benefits of the marital partnership.[8]

Prior to Kastely's 1984 essay, Hawai'i's Intermediate Court of Appeals ("ICA") had already begun writing opinions on property division incident to divorce, which reflected more than an inkling that it understood and endorsed the partnership concept as described in Kastely's article.[9] Aiming to give trial judges and law practitioners a level of uniformity, stability, clarity or predictability to guide negotiations and structure decisions regarding property division, the ICA began to set forth a number of "general rules" that were consistent with a partnership model of marriage.[10] After the Kastely article, the ICA continued to give shape and structure to the division and distribution of marital assets, ultimately devising a system of "uniform starting points" to direct decisionmaking.[11] In all its decisions, the court applied a model of equal partnership to the marital unit without actually stating so.

Ironically, it took two striking reversals from the Hawai'i Supreme Court, first *Cassiday v. Cassiday*[12] in 1987, then *Gussin v. Gussin*[13] in 1992, to bring "partnership" into the vocabulary of reported decisions. In both decisions, the high court referred specifically to marriage as a partnership and recognized how the ICA had used this analogy to promulgate its rules. However, troubled

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value of her contributions as the supportive stay-at-home spouse. This case will be discussed later in this article. *See infra* notes 256-58, 262-79 and accompanying text.

[8] *See* Sharp, *supra* note 6, at 199.

[9] In fact, Professor Kastely noted that at the time of her article, numerous commentators had already endorsed the partnership model for equitable distribution states. *See* Kastely, *supra* note 1, at 390 n.52.

[10] An example of these rules may be found in *Raupp v. Raupp*, 3 Haw. App. 602, 658 P.2d 329 (1983), in which the Intermediate Court of Appeals announced its first two general rules. The first stated that "it [was] equitable to award each divorcing party the DOM [date of marriage] net value of his or her premarital property." *Id.* at 610, 658 P.2d at 335. The second stated that "it [was] equitable to award each divorcing party the date of acquisition net value of gifts and inheritances which he or she received during the marriage." *Id.* at 611, 658 P.2d at 336. These rules were intended to guide all lower courts in its treatment of property at divorce.

[11] As will be discussed later in this article, the Intermediate Court of Appeals devised a system of uniform starting points to give practitioners and trial judges a uniform place to begin their analysis of how to divide different categories of net market values. *See* discussion *infra* Part III.A. For example, the uniform starting point for dividing the date-of-marriage net market value of all property owned separately by each spouse at the start of the marriage was 100% to the owner spouse and 0% for the non-owner spouse. *See* Hashimoto v. Hashimoto, 6 Haw. App. 424, 428-29, 725 P.2d 520, 524 (1986).

[12] 6 Haw. App. 207, 716 P.2d 1145 (1986), *cert. granted*, 67 Haw. 685, 744 P.2d 781 (1985) *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986).

[13] 9 Haw. App. 279, 836 P.2d 498 (Haw. App. 1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 836 P.2d 484 (1992).

that the ICA's "fixed" rules had diminished the discretion of the family court to grant "just and equitable" decisions as required by statute, the high court rejected the ICA's attempts to bring uniformity, stability, certainty and predictability into family court decisions.[14]

While disagreeing with the ICA's methods, the Hawai'i Supreme Court acknowledged the ICA's desire to provide structure and guidance to trial judges. To answer the ICA's concern, the high court, first in *Gussin* then two years later in *Tougas v. Tougas*,[15] offered the partnership model as the conceptual framework for dividing property at divorce.[16] The high court wrote, "our acceptance of the 'partnership model of marriage' provides the necessary guidance to the family courts in exercising their discretion and to facilitate appellate review."[17]

Not satisfied, the ICA responded. Just a few months after *Tougas*, the ICA issued a decision in *Hussey v. Hussey*,[18] in which it created a new framework of guiding principles for dividing property at divorce, drawing partly from the state's commercial partnership statute under Hawai'i Revised Statutes section 425-118(a).[19] These principles are by and large similar to the ICA's earlier efforts which is not surprising in light of the ICA's general adherence to partnership principles long before its *Hussey* decision. At this writing, *Hussey* remains unreversed, and the ICA continues to use it as the launching point for its decisions.[20]

Analogizing marriage to a partnership, more specifically a commercial partnership, was a legal construct largely necessitated by a nationwide turn toward no-fault divorces. The disappearance of fault-based divorces meant easier access to divorces and thus, for dependent homemaker spouses, a loss

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[14] As discussed later in this article, the high court held that any attempt to dictate the division of property by a defined set of rules directly violated the statutory mandate set forth in Hawai'i Revised Statutes section 580-47(a). *See* discussion *infra* Part III.B. This section directs courts to make a "just and equitable" division. The supreme court determined that the ICA's construction of rules, both pre-*Cassiday* and pre-*Gussin*, had the effect of restricting the discretion of trial judges to fashion just and equitable distributions.

[15] 76 Hawai'i 19, 868 P.2d 437 (1994).

[16] *See generally* Lori L. Yamauchi, *Gussin v. Gussin: Appellate Courts Powerless to Mandate Uniform Starting Points in Divorce Proceedings*, 15 U. HAW. L. REV. 423 (1993).

[17] 836 P.2d 498 (Haw. App. 1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 486, 836 P.2d 484 (1992).

[18] 77 Hawai'i 202, 881 P.2d 1270 (Haw. App. 1994).

[19] *See infra* note 258.

[20] At this writing, the ICA has authored four post-*Hussey* decisions dealing with property division: Epp v. Epp, 80 Hawai'i 79, 905 P.2d 54 (Haw. Ct. App. 1995), Markham v. Markham, 80 Hawai'i 274, 909 P.2d 602 (Haw. Ct. App. 1996), Kreytak v. Kreytak, 82 Hawai'i 543, 923 P.2d 960 (Haw. Ct. App. 1996), and Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997). *See also infra* note 433.

of the financial security that had been part of the promise of marriage.[21] The partnership analogy helped courts, legislatures, and legal scholars reconceptualize the marital unit to justify an equal award of property to the dependent spouse, even if that spouse neither made direct financial contributions to the acquisition of property nor appeared on title.[22] It was also intended to create a sufficiently large award of property to divorcing spouses so as diminish the need for alimony, which had previously been the primary source of post-divorce support, and to facilitate a "clean break" between the parties.[23]

In Hawai'i, modern appellate decisions have tended to support this remedial[24] or redistributive character without specifically stating so. In aggregate, these decisions have maintained a relatively large reservoir of theoretically divisible property,[25] favored categorization of property as "marital," and provided rules, modeled after Hawai'i's commercial partnership statute, that mandate an equal distribution of the marital profits absent valid and relevant circumstances to justify a deviation. Thus, a spouse who chose to remain at home or whose marketplace work opportunities were somehow limited by the rigors of household management and familial caregiving, could still expect to share equally in the financial profits of the marriage.

In recent ICA cases, however, the ICA's response to *Gussin* and *Tougas* have begun to read like "partnership with a vengeance," with an increasing tendency to stay close to the partnership template even where facts might justify some deviation. This article seeks to temper the partnership fervor without extinguishing it, and suggests pausing to see where the model is taking us. The partnership model is seductive in the ideal it holds up to us, but

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[21] *See* Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 615 (1996).

[22] *See* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 118 (1988).

[23] *See* Starnes, *supra* note 5, at 97.

[24] Being "remedial" or "redistributive" means moving away from the former practice of distributing property at divorce based on who held title to property and toward a distribution which reflected the important economic and non-economic ways in which both husbands and wives contributed to the marital unit. *See* Sharp, *supra* note 6, at 198.

[25] A hotchpot approach to property division contemplates a melding of all property, separate, marital and otherwise, into a single pot followed by an equal doling out of the pot's contents to awaiting recipients. While Hawai'i Revised Statutes section 580-47 authorizes Hawai'i courts to divide and distribute "the estate of the parties, real, personal, or mixed, whether community, joint or separate," Hawai'i's approach has not been to create and split a hotchpot. As a matter of practice and law, courts acknowledge and can consider the separate identities of certain properties but are not required, as in other jurisdictions, to restore separate property to the owner spouse. As seen later in this article, recent appellate cases allow parties to totally exclude properties from the marital partnership and thus from division. *See* discussion *infra* Part III.D. However, even here, trial judges are able to look at the amount of the excluded property to help them fashion a fair division of the divisible partnership estate. *See id.*

we should neither presume its perfection nor allow it to bar consideration of other models.

Before looking at the beyond, this article takes a long backward glance at the development of the partnership model in Hawai'i. Decisions in the 1980's and the 1990's, culminating in the *Gussin - Tougas - Hussey* trilogy, represent an accelerated evolution that was preceded by a more gradual but necessary sequence of decisions, events, and movements that began over a hundred years ago. Pieces of the model began to assemble well before the cases of the past thirteen years, and serve to lay the foundation for the model as we now understand it. For one, the process required the labored changes in societal attitudes regarding gender roles and positions, and the enactment of laws to reflect and reinforce these changes.

The more recent flurry of judicial decisions effectively institutionalized the partnership model. This article suggests, however, that the lofty expectations of the model, as noble as they might be, may not comport with the actual expectations of the parties and lead to perceptions that the court "got it wrong." An increasingly stiff application of the partnership template only aggravates this. A reminder is also left with the court to consider whether the model actually achieves what it sets out to do and to "hold to the light" other possibilities including compensatory spousal payments.

In culinary terms, what we have is something that was slow-cooked then, in recent years, flashed-fried, like the meaty uhu[26] or parrot fish, a local favorite served at homes and restaurants. Extending the analogy, the partnership model, as attractive as it is, cannot be devoured with abandon. In the case of the uhu, sharp unbending bones await the unwary. Likewise, the partnership model if applied without thought, can produce results that fall short of our standards for fairness.

Part II provides a brief historical perspective of the partnership concept and describes the convergence of the pieces needed for the emergence of the partnership model in Hawai'i. Part III chronicles the flurry of exchanges between Hawai'i's two appellate courts, a process that forged and institutionalized the model in this state. Part IV looks at how Hawai'i's incarnation of the partnership model projects the court's heightened expectations of marriages and family, as well as, the contributions and obligations that should occur within them. The article concludes with the notion that our courts are

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[26] *Uhu*, or the parrot fish, is an island favorite that is prepared at some Chinese restaurants. One method of preparation is to scald or "flash-fry" it with very hot oil after pouring shoyu and placing chopped green onions, sliced ginger, and cilantro on the fish. However, because of the size and meatiness of the uhu, it is generally insufficient to rely on flash-frying to ensure thorough cooking. Thus, prior to pouring the oil, the fish should be steamed first, a slower process that if done right will result in meat that is flaky and tender.

moving in the correct direction, but must be careful about unduly skewing its vision when applying the partnership model.

II. ASSEMBLING THE PIECES

A. *Where Did the Partnership Model Come From?*

At the time of Professor Kastely's article, the partnership model had already vaulted into the national psyche. Her reference to marriage as a partnership, which was later cited in Hawai'i appellate decisions, can be traced to a report of the 1963 President's Commission on the Status of Women which stated in pertinent part: "Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living."[27]

In 1970, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Marriage and Divorce Act ("UMDA") which, although never adopted in Hawai'i, placed an imprimatur on many of our current notions regarding marriage and how decisions should be made when a divorce occurs. Its prefatory note contained a brief but clear reference to the partnership model as the framework for property division, stating "[t]he distribution of property upon the termination of marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership."[28]

The roots of this now often-cited analogy are actually centuries old, arising not from our Anglo-American common law tradition,[29] but from the Civil

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[27] COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, 18 (1963). Professor Kastely noted the committee's reference to marriage as a partnership in her article. *See* Kastely, *supra* note 1, at 390 n.52.

[28] UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 147, 149 (1973). Interestingly, the term "partnership" was not used again in the text of the model act. However, as later discussed, partnership concepts undergirded the section on property division. *See* discussion *infra* Part II.E.

[29] In the broad sense that partnerships represent the melding of disparate parts to form a unit, with each part assuming a role in the function of the unit, our Anglo-American common law tradition provides an odd but ultimately unsatisfying match. As noted by Justice Hugo Black in *United States v. Yazell*, 382 U.S. 341 (1966), the common law determined that upon marriage, husband and wife became one, with the "one" being the husband. *See id.* at 359.

In his commentaries, Blackstone described this merger of husband and wife into a single legal identity:

> By marriage, the husband and wife are one person in law . . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything; and is therefore called . . . a *femme-covert*; and her condition during her marriage is called her coverture.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765), *quoted in* LENORE WEITZMAN, THE MARRIAGE CONTRACT 1 (1981).

Code of Spain which came to North America by way of Spanish colonialization of Mexico and surrounding areas.[30] The code espoused marriage as a partnership which respected the individuality of each spouse.[31] Unlike Anglo-American common law, the Spanish Civil Code allowed both spouses to retain their premarital legal identities, recognized and valued the individual contributions of each spouse to the marital effort, and extended to each the earned right to share in the assets of the marriage.[32]

Although the common law concept of a merged legal identity contained both the unit-forming and contributory aspects of partnerships it failed to recognize the continuing vitality and individuality of *both spouses* after the marriage, an element essential to our modern understanding of marital partnerships. Homer Clark wrote:

> Anglo-American law has for centuries prescribed rules for the proper behavior of husbands and wives in marriage. These rules were often stated in the abstract. Specifically, the courts have said that the husband has a duty to support his wife, that she has a duty to render services in the home, and that these duties are reciprocal.

1 HOMER CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 423 (2d ed. 1987).

[30] *See* Suzanne Reynolds, *Increases in Separate Property and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 249 (1989). The Spanish Civil Code provided the rule of law to Mexico and surrounding areas that were settled and colonized by Spain beginning in the 1700's. After Mexico gained independence in 1821, it used the code as a foundation for governance. Beginning in 1848, regions of Mexico that later formed many of the southwestern and southern border states of the United States, came under the U.S. sovereignty. In these regions, the influence of the Spanish Civil Code persisted in varying degrees thus blending Spanish jurisprudence into the formation of American law. *See* W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES 8 (1982).

[31] *See* MCCLANAHAN, *supra* note 30, at 331.

[32] *See id.* The Spanish Civil Code was subject to the scholarly review of "jurisconsults" who published commentaries on the meaning of sections and phrases within the code. *See id.* at 28. Since it was not uncommon for Spanish judges to rely on these commentaries when deciding cases, the work of jurisconsults significantly influenced the formation of law within the civil code system. *See id.*

Consistent with the code, jurisconsults discussed marriages as partnerships in surprisingly modern terms. Although not in full accord on how partnerships dictated the division of property among spouses, jurisconsults agreed that spouses were partners who worked to benefit the marital community and shared in the fruits of marital labor.

For example, Juan de Matienzo, a preeminent sixteenth century jurisconsult, wrote: "With regard to community of goods the law has regard to the industry and common labour of each spouse and to the burdens of partnership and community." 2 WILLIAM QUINBY DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 75-76 (1943). He added, "just as an express partnership connotes a kind of contract of brotherhood, so too the partnership of husband and wife is called a brotherhood" thereby justifying the "sharing of property acquired during marriage [which] takes effect even though the husband comes to the marriage a rich and wealthy man while the wife is poor and altogether without a dowry." *Id.* at 76-77. He recognized that "[t]he wife can work and take care of and preserve the family property" and that "the poorer spouse by work and labour makes up the deficiency in his or her estate." *Id.* at 77.

Another noted jurisconsult, Joaquin Escriche y Martin (1784-1847), wrote "there is established between the two consorts a partnership, though legal, different from others in that

Its influence persisted when regions that had been under Spanish then Mexican rule came under the sovereignty of the United States.[33] These states became known as "community property" jurisdictions and provided a counterpoint to the common law states.[34] Although community property law never became the majority position in this country,[35] it provided a model for common law jurisdictions seeking to reformulate concepts of marriage, gender status, and spousal property rights. As envisioned by the Spanish Civil Code and the community property states, the concept of marriage as a partnership of two spouses offered a ready alternative to the traditional "husband-centric" model.

Finding a new way to think about property division was partly accelerated by the national movement toward no-fault divorces which began in the 1960's and was itself a result of changing perceptions about marriage, its functions, and its principles.[36] Under the fault system of divorce, punishment of spousal misconduct, even when the conduct had no effect on marital wealth, was considered an appropriate factor in deciding how to divide and distribute

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the acquisitions are the property of each in equal proportions." RICHARD A. BALLINGER, A TREATISE ON THE RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OF GANACIAL SYSTEM 43 (1895). Escriche y Martin pointed out that Spanish law construed all acquisitions as equal in each spouse notwithstanding the fact that one spouse did not directly contribute skill, labor or industry to the acquisition. *See id.*

[33] States that originally adopted the community property scheme as set forth by the Spanish Civil Code included Arizona, California, Texas, New Mexico, Florida and Louisiana. Before the end of the nineteenth century, its influences migrated north, affecting Washington and Idaho. *See* BALLINGER, *supra* note 32, at 31-32. At present, only eight states retain the community property system including Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. *See* Susan S. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 569 n.10 (1995). Wisconsin, by virtue of its adoption of the Uniform Marital Property Act, is considered by some to be a community property state. However, there is some disagreement on whether the Uniform Marital Property Act is a community property law. *See* JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION 1-8, 1-9 (1989).

[34] *See* 2 HOMER CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 177 (2d ed. 1987).

[35] *See id.* at 177 n.10.

[36] In her article, Bea Ann Smith quoted Karl Llewellyn who wrote, "as we turn to review the changes occurring in the ways by which single marriages serve their radiant functions, we shall find also the social changes mirrored, distorted but unmistakable, in the rules and practice on marriage dissolution." Smith also quoted Llewellyn as saying, "[c]hange the practices of marriage, and divorce, after due lag, will be found readjusting to suit." Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 694–95 (1990) (quoting Karl Llewellyn, *Behind the Law of Divorce (pt.1)*, 32 COLUM. L. REV. 1281, 1286 (1932)).

property at divorce.[37] When states began eliminating fault-based divorce, an adjustment was also in order where property was concerned.[38] One obvious reason was that allowing parties to use spousal misconduct as leverage for larger property awards worked against one of the driving forces for no-fault divorces: reducing the acrimony that accompanied fault finding.[39] But to the extent that the move to no-fault divorces was an attempt to catch up with evolving social perceptions and beliefs, so too was the change in property division law a reflection of shifting norms and values.[40]

That the opportunity to rethink property division rules occurred at a time when discussions on gender equality issues were well under way greatly influenced the direction of reform.[41] The notion that equal marital partners were entitled to an equitable share of the marital estate upon divorce, based on a concept of shared efforts and property, seemed to provide the correct fit. Commercial partnership principles, as codified under the Uniform Partnership Act,[42] embodied some of the features of the Spanish Civil Code's marital

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[37] *See generally* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2311-12 (1994).

[38] *See* JACOB, *supra* note 22, at 117.

[39] *See id.*

[40] Lawrence Friedman in his insightful history of divorce law wrote that the fault-based system of divorce became largely one of mutual consent and collusion, one of winks and knowing nods, that persisted because of two irreconcilable social demands: the genuine demand for divorce and the equally compelling demand for moral legitimacy in relationships of family and sex. *See* Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 662–63, 666 (1984). And thus, no-fault divorce, which allowed consensual (not to say that the consent was always mutual) dissolution minus the collusion, represented a more honest albeit delayed ratification of what had long been desired but became achievable only when an adequate quantum of moral opposition finally crumbled. *See id.* at 664–66.

What social changes created the environment which allowed no-fault divorces to explode on to the scene? Friedman strongly suggests the answer by listing the factors that ultimately allowed no-fault divorce to thrive: the sexual revolution, the fading stigma of divorce, the new role of women and marriage, and the emphasis of personal choice. *See id.* at 667.

Likewise, the change in property law also reflected social changes and could only occur when social realities created the appropriate environment.

[41] The push toward gender equality intersected with the movement away from fault-based divorces. To the extent that women had looked to marriage as a significant if not sole source of support and had therefore been protected by barriers to divorce, increasing access to divorce by eliminating the showing of fault was an acknowledgment that women had the capacity to fend for themselves, marriage notwithstanding. However, whether society actually provided real opportunities for them was another matter. *See generally* WEITZMAN, *supra* note 4, at 357-99.

[42] The Uniform Partnership Act, or UPA, was first adopted by the Commissioners on Uniform Laws in 1914. *See* James W. Boyle, *Preliminary Provisions and the Nature of a Partnership Under the UPA*, 9 HAW. B.J. 83, 84 (1973). In 1972, Hawai'i became the forty-fourth jurisdiction to adopt the UPA. *See id.* at 84 n.6.

partnership and thus provided an additional model for states to look to.[43]

B. Evolving Gender Positions and the Married Women Property Acts

Like other common law states, Hawai'i had to undergo an evolution in its view of gender-based roles and positions within marriage before it could accept the partnership model as a conceptual framework for the division and distribution of property at divorce.[44] It was a progression that took time to develop.

Because of its unique history as an independent kingdom with a strong indigenous cultural heritage which remained largely unaffected by western influences until the nineteenth century, evolution of gender positions in Hawai'i did not initially track the changes occurring in the United States. However, with the arrival of Protestant missionaries in 1820 and the embracing of their mores and values by significant leaders within the kingdom,[45] Hawai'i became

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[43] As seen later in this article, Hawai'i's courts did in fact rely directly on the UPA, codified under Hawai'i Revised Statutes Chapter 425, to develop rules for property distribution upon dissolution of a marital partnership. *See infra* note 258 and accompanying text.

[44] Like many other evolutionary processes, defined stages represent no more than fluid beliefs consisting of remnants from a passing stage, along with newly emerging perspectives seeking articulation and understanding.

Even the often cited mergence of man and women into a single identity favoring the husband may be at best an approximation. To wit, English law historians Pollock and Maitland wrote:

> In particular we must be on our guard against the common belief that the ruling principle is that which sees an 'unity of person' between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph; and may now and again lead us out of or into a difficulty; but a consistently operative principle it cannot be.

2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 405–06 (2d ed. 1968).

[45] Kamehameha the Great, the father of the Hawaiian kingdom, died less than a year before the arrival of the missionaries. *See* SHELDON DIBBLE, HISTORY OF THE SANDWICH ISLANDS, 124, 139 (1909). His son and heir Liholiho (Kamehameha II) was the sovereign when the missionaries arrived. Although characterized by some as a weak ruler who had an appetite for material goods and alcohol and who could not conform his conduct to the moral codes of the missionaries, Liholiho was considered friendly and occasionally attended public worship. *See* HAROLD WHITMAN BRADLEY, THE AMERICAN FRONTIER IN HAWAII, THE PIONEERS, 1789–1843, 59, 142 (1968). Upon leaving Hawai'i for an ill-fated journey to England in November 1823, Liholiho appointed Kaahumanu, the favorite wife of his father and Liholiho's *kuhina nui* [The *kuhina nui*, although translatable into English as the premier or prime minister, actually held power roughly equal to the king. *See* 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778–1854: FOUNDATION AND TRANSFORMATION (1965)] regent or the *de facto* ruler in his absence. *See id.* at 78, 117. Liholiho, who became ill, did not return until after his death. The throne passed to the then eleven-year-old Kauikeaouli (Kamehameha III). *See id.*

During Kauikeaouli's minority, the regency continued. *See id.* Kaahumanu, who converted to Christianity in 1825, led the kingdom's highest chiefs in lending the prestige and power of

quickly immersed in Anglo-American thought and perceptions.[46]

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their offices to the enforcement of a series of moral reforms. *See* BRADLEY, *supra* note 45, at 169. Despite admonitions against interfering with the political landscape, the missionaries took advantage of the willingness of the kingdom's leaders to put forth a program of moral legislation which "substituted the ideals of rural New England for the folkways of a Polynesian archipelago." *Id.* at 168. Growing commercial interests and the presence of foreigners also pushed the kingdom toward legislation that reflected western influences and values. *See* KUYKENDALL, *supra* note 45, at 120-26.

[46] Prior to the arrival of Protestant missionaries from New England in 1820, the status of women in Hawai'i developed against a frame of reference which differed in significant ways from that experienced by married women on the North American continent. *See* Judith R. Gething, *Christianity and Coverture: Impact on the Legal Status of Women in Hawaii, 1820–1920*, 11 HAWAI'IAN J. OF HIST. 193 (1977). Until 1819 when it was abolished by Liholiho (Kamehameha II), Hawai'i had a *kapu* system which separated men from women in certain aspects of daily life on the assumption that women had a polluting effect. While this might suggest another system that institutionalized the diminution of women, the *kapu* system did not tell the whole story. Women, in fact, could wield great power in pre-missionary Hawai'i, and who was positioned to do so depended less on a binary system of male-female categories, and more on a matrix consisting of male-female, chiefly-commoner groupings. *See* JOCELYN LINNEKIN, SACRED QUEENS AND WOMEN OF CONSEQUENCE–RANK, GENDER, AND COLONIALISM IN THE HAWAIIAN ISLANDS 75 (1990).

The dissimilarity was amplified by the different system of land tenure which existed in pre-missionary Hawai'i. Not a commodity to be bought, sold or owned, land in pre-contact Hawai'i had a deep cultural and religious significance which made stewardship rather than ownership the hallmark of land tenure in Hawai'i. Land was to be cherished and cared for rather than merely used. *See* LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 25-26, 51 (1992). Yet there was a hierarchical system for control of the land. What was present in Hawai'i prior to the ascension of Kamehameha I was akin to a feudal system wherein land was vested in the *Mo'i* (the King who was the paramount chief) of each island who in turn apportioned control and possession to members of the class of high chiefs or *Ali'i Nui*. Upon the arrival of a new *Mo'i* (either through succession or conquest), all control of land reverted to him or her for reapportionment according to his or her dictates in consultation with a council of *Ali'i Nui*. *See id.* at 51-52.

After Kamehameha united all major islands except for Kauai in 1795, he gave large tracts of land in perpetuity to four *Ali'i Nui* who had contributed to the great *Mo'i's* rise to power. These four were allowed to pass their interest to their descendants. *See id.* Thus began a system of land inheritance and gifting which developed and expanded to bring land into the control of female *Ali'i Nui* and lesser chiefs. *See id.* at 133. In the case of inheritance, it was common for female *Ali'i* to pass their interest to female descendants. *See id.*

The influence of the missionaries and their western view of gender positions within families quickly took hold following their arrival in 1820 and was clearly reflected in laws promulgated by the Hawaiian monarchy beginning in the 1840's. Within a short period of time, the missionary influence, at least as reflected by early Hawaiian legal codes, managed to turn traditional Hawai'i into a "remarkably close copy of mid-19th century New England." Gething, *supra* note 46, at 195.

This stark and rapid shift in the status of women provoked suffragist Susan B. Anthony to remark:

It is therefore helpful to look at some of the developments in the law regarding married women and property leading to the mid-1800's when Hawai'i began its immersion into a more western, specifically Anglo-American jurisprudence.

1. Early developments

Because divorces in most Anglo-American jurisdictions did not become prevalent until the nineteenth century,[47] early developments in spouse-related

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I have been overflowing with wrath ever since the proposal was made to engraft our half-barbaric form of government on Hawai'i and our other new possessions. I have been studying how to save, not them, but ourselves, from disgrace. This is the first time the United States has ever tried to foist upon a new people the exclusively masculine form of government.

Id. at 213.

Two Political Science professors at the University of Hawai'i metaphorized the decision of Protestant missionaries to protect, rescue and ultimately dominate Hawaiian society as a peculiarly patriarchal imposition upon a Hawai'i that had been perceived as the "weak female needing manly protection from a dangerous world." Kathy Ferguson & Phyllis Turnbull, *Masculine Order and Feminine Hawaii: From Missionaries to the Military*, 38 SOCIAL PROCESS 96 (1997). In their article, they discuss how the missionaries (and military systems) in Hawai'i have contributed to and shaped the patriarchal concepts of our day to day society. *See id.*

[47] Professor Lawrence Friedman described this dearth:

England had been a "divorceless society," and remained that way until 1857. There was no way to get a judicial divorce. The very wealthy might squeeze a rare private bill of divorce out of Parliament. Between 1800 and 1836 there were, on the average, three of these a year. For the rest, unhappy husbands and wives had to be satisfied with annulment (no easy matter), or divorce from bed and board (*a mensa et thoro*), a form of legal separation which did not entitle either spouse to marry again. The most common "solutions," of course, when a marriage broke down, were adultery and desertion.

In the colonial period, the South was generally faithful to English tradition. Absolute divorce was unknown, divorce from bed and board very rare. In New England, however, courts and legislatures occasionally granted divorce. In Pennsylvania, Penn's laws of 1682 gave spouses the right to a "Bill of Divorcement" if their marriage partner was convicted of adultery. Later, the governor or lieutenant governor was empowered to dissolve marriages on grounds of incest, adultery, bigamy, or homosexuality. There is no evidence that the governor ever used this power. Still later, the general assembly took divorce into its own hands. The English privy council disapproved of this practice, and, in the 1770's, disallowed legislative divorces in Pennsylvania, New Jersey, and New Hampshire. The Revolution, of course, put an end to the privy council's power.

After Independence, the law and practice of divorce began to change; but regional differences remained quite strong. In the South, divorce continued to be unusual. The extreme case was South Carolina. Henry William Desaussure, writing in 1817, stated flatly that South Carolina had never granted a single divorce. He was right. There was no such thing as absolute divorce in South Carolina, throughout the 19th century. In other Southern states, legislatures dissolved marriages by passing private divorce laws . . . .

property law tended to forge around intact marriages.[48] These developments either dictated how property was held or controlled during marriage, or defined how property was distributed upon the death of a spouse.[49] They remain relevant, however, to the divorce context in the way they reflected and

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North of the Mason-Dixon line, courtroom divorce became the normal mode, rather than legislative divorce. Pennsylvania passed a general divorce law in 1785, Massachusetts one year later. Every New England state had a divorce law before 1800, along with New York, New Jersey, and Tennessee. Grounds for divorce varied somewhat from state to state.

LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 204-05 (2d ed. 1985).

The story was scripted differently in Hawai'i at least during the pre-missionary period. Prior to the arrival of Protestant missionaries from New England in 1820, marriage and divorce customs were described as "quite informal" leading to a fluidity in the formulation and dissolution of unions:

[E]xcept for the people of superior rank, there was very little in the way of ceremony connected with marriage. Divorce consisted merely in quitting and either party was free to terminate the arrangement at will, but there was some sentiment against changing wives frequently . . . . A man might have two or more wives and, at the same time, each wife might have two or more husbands.

Robert C. Schmitt & Rose C. Strombel, *Marriage and Divorce in Hawai'i Before 1870 in* HAWAI'I HISTORICAL REVIEW, SELECTED READINGS 241 (Richard A. Greer ed., 1969).

Missionary influences quickly aligned Hawai'i's marriage and divorce customs with those on the mainland United States, institutionalizing procedures for and restrictions on marriages and divorces. The first Christian marriage among Hawaiians occurred on August 11, 1822. *See id.* In 1826, Hoapili, the governor of Maui who himself had entered into a Christian marriage in 1823, outlawed at will unions and dissolutions on his island. *See id.* In the same year, missionaries laid the foundation for a fault-based process for divorce, passing a resolution which stated "an aggrieved party justly complaining of adultery, or willful desertion . . . may, by consent of the proper authorities, be married to another . . . [and] . . . that the deserting party cannot contract a new marriage . . . until the deserted is known to be fairly divorced." *Id.* at 243.

Under the guidance of Christian convert and *kuhina-nui* Kaahumanu, young Kauikeaouli (Kamehameha III) on September 21, 1829 proclaimed in *No Ka Moe Kolohe* ("Law Against Licentiousness") the following:

If a man sleeps with a woman and his wife be displeased and wish to be separated she may apply to the Governor who shall grant a divorce and they shall be separated. If the wife wish to leave him and marry again she may but the guilty husband shall not be at liberty to marry again until the death of his first wife.

Id.

The king reworded this in 1835, proclaiming that:

[I]f the husband of the adulterous wife, or wife of the adulterous husband desires to be separated for life on account of disgust arising from frequent adultery and bad conduct, let a bill of divorcement be given and let them separate; but the adulterous persons shall by no means marry again till the death of the party forsaken.

Id.

The years that followed saw a broadening in the grounds for divorce. In 1853, jurisdiction over the granting of divorces moved from the governor to the courts. *See id.* at 244.

[48] *See generally*, CLARK *supra* note 34, at 498-524.

[49] *See id.*

institutionalized the incremental shifts in gender roles and positions, explained the framework of property rights and obligations between spouses, and provided a starting point for deciding how such rights and obligations might shift when marriages dissolved. Thus, some of the developments described below should be understood as doctrines, devices or practices that arose outside the divorce context but later became useful in framing the discussion of property division incident to divorce.

As stated earlier, one could generally characterize the early common law framework as being based upon the "unity" of husband and wife with the emergent unit being heavily, if not wholly dominated by the husband.[50]

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[50] In *Peters v. Peters*, 63 Haw. 653, 634 P.2d 586 (1977), the Hawai'i Supreme Court reviewed the history of gender positions within marriages enroute to deciding whether to uphold the then-existing doctrine of interspousal tort immunity. The court quoted from William Blackstone's Commentaries on English Law to describe the merging of the wife's identity into her husband's:

> By marriage, the husband and wife are one person in the law: (1) that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme covert, foemina viro cooperta*; it is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

Id. at 656, 64 P.2d at 588 n.2 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765)).

Interestingly, the quote mixes two images. The first is the pure merging of legal identities into a unit that is essentially the husband. Whether there was simply a death of the woman's identity or a mere suspension during the marriage seems moot; the effect was the same at least during the course of the marriage. The second image is that of the husband serving as a guardian and protector, allowing the woman to maintain a separate albeit inferior identity characterized by weakness, dependency and vulnerability. The latter has been argued by some as a counter against the generally accepted notion of "unity" between husband and wife. Pollock and Maitland, for example, viewed the "unity" concept as one which reduced women to "a thing or somewhat that is neither thing nor person." In their view, what really existed was an "exaggerated guardianship" which at least preserved a woman's personhood. *See* POLLOCK & MAITLAND, *supra* note 44, at 405–06. Others have responded that requiring husbands to save their wives from their assumed incompetence did not place women in a significantly better position and dismiss it as "(un)convincing apologia." *See* WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY LAW 4 n.14 (2d ed. 1971).

Regardless of which model we accept—the merged identity model, the guardianship model or a hybrid—common law property doctrines had a decidedly protective or paternalistic attitude toward women. For example, the concept of "dower", or the legal right or interest that a wife acquired by marriage in the estate of her husband, was developed to protect a wife from destitution in the event of widowhood. *See* LOUIS CANNELORA, SUMMARY OF THE HAWAI'I LAW OF DOWER AND CURTESY AND COMMUNITY PROPERTY 1 (1971). The dower, which under common law became quantified as one-third of all lands owned by the husband during the

Property rules relating to spouses reflected this, giving to the husband dominion over the property brought into the marriage by the wife or acquired by her during the marriage.[51] In the rare instances where a marriage was

coverture or marriage, was protected to the extent that the husband could not alienate it by selling lands during the marriage without first receiving the consent of the wife by way of joining in the conveyance. As an alternative, the husband could will to his wife an equivalent life estate in lands, thereby skirting the dower. *See* ELIZABETH BOWLES WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–1861, 10–11 (1987).

[51] Pollock and Maitland roughly summarized the final shape that common law took. A few sentences from that summary are as follows:

> 1. In the lands of which the wife is tenant in fee whether they belonged to her at the date of the marriage or came to her during the marriage, the husband has an estate which will endure during the marriage, and this he can alienate without her concurrence. If a child is born of the marriage, thenceforth the husband as tenant of the curtesy has an estate which will endure for the whole of his life, and this he can alienate without the wife's concurrence. The husband by himself has no greater power of alienation than is here stated; he can not confer an estate which will endure after the end of the marriage or (as the case may be) after his own death. The wife has during the marriage no power to alienate her land without her husband's concurrence.
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> 2. Our law institutes no community even of movables between husband and wife. Whatever movables the wife has at the date of the marriage, becomes the husband's, and the husband is entitled to take possession of and thereby to make his own whatever movables she becomes entitled to during the marriage, and without her concurrence he can sue for all debts that are due to her.
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> 3. Our common law—but we have seen that this rule is not very old—assured no share of the husband's personality to the widow. He can, even by his will, give all of it away from her except her necessary clothes, and with that exception his creditors can take all of it. A further exception, of which there is not much to be read, is made of jewels, trinkets and ornaments of the person, under the name of *paraphernalia*. The husband may sell or give these away in his lifetime, and even after his death they may be taken for his debts; but he cannot give them away by will.
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> 4. During the marriage the husband is in effect liable to the whole extent of his property for debts incurred or wrongs committed by his wife before the marriage, also for wrongs committed during the marriage. The action is against him and her as co-defendants.

POLLOCK & MAITLAND, *supra* note 44, at 403-05.

As described in the *Peters* decision, Hawai'i codified this "ancient but unvenerated concept of the female marriage partner's legal subjugation" in 1846 as part of Act 2, 1 Statute Laws of His Majesty Kamehameha III. In relevant part, the statute read:

> The wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead. She shall not, without his consent, unless otherwise stipulated by anterior contract, have legal power to make contracts, or to alienate and dispose of property—she shall not be civilly responsible in any court of justice, without joining her husband in the suit, and she shall in no case be liable to imprisonment in a civil action. The husband shall be personally responsible in damages, for all the tortuous [sic] acts of his wife; for assaults, for slanders, for libels and for consequential injuries done by her to any person or persons in this kingdom.

Peters, 63 Haw. at 657, 634 P.2d at 589 n.3 (citing Act 2, 1 Statute Laws of His Majesty Kamehameha III).

dissolved, property division generally depended on who held title to the property or contributed the funds to acquire it. It was essentially an owner-driven distribution.[52] While this appeared to offer relief to the wife by letting her recoup her separate property, it actually favored husbands, in light of the general incapacity of married women at the time to hold or acquire property.[53] Many wives simply had little to recoup.

2. Getting around legal disabilities of the common law

In the seventeenth century, England's courts of chancery or equity[54] began to uphold devices created to reverse or circumvent the legal disabilities suffered by married women.[55] For example, wealthy fathers seeking to preserve the right of property management and use for their daughters resorted to trusts as a way of bypassing their sons-in-law.[56] This gave the daughter a

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[52] *See* JACOB, *supra* note 22, at 113; BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY 4 (2d ed. 1994); *see also* RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES, A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW 64 (1994).

[53] *See* JACOB, *supra* note 22, at 113. This, in large part, caused alimony to become the primary form of post-divorce support. Support of the ex-wife was considered, at least until the eighteenth century, to be an extension of the husband's duty to support during marriage. The heritage for this view of alimony came from England where absolute divorces were prohibited until the mid-1800's. English courts, however, were authorized to grant divorce *a mensa et thoro*, which amounted to separations short of legal dissolution. The support which the husband was ordered to pay his estranged wife was considered to be no more than what he was expected to do since the marriage was still technically intact. *See* CLARK, *supra* note 34, at 220–21.

[54] England's equity courts were a response to the strictures of the common law. Individuals who were unable to gain justice through the formal application of common law could theoretically approach the king, who was considered the "fountainhead" of justice, for an alternative decision based on considerations of fairness. The original arbiters of equity were the king's secretary known as the chancellor. Early chancellors were clergymen who were more familiar with church or canonical teachings than the common law. Their rulings and grants of relief were therefore based on moral or ethical grounds. As the demand for such rulings increased, a separate court system, consisting of courts of chancery or equity, was devised to consider and grant equitable relief. *See* GEORGE L. CLARK, EQUITY–AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS 3-4 (1919).

[55] *See* CLARK, *supra* note 34, at 501. It should be pointed out that under English common law, unmarried women enjoyed legal property rights far in excess to that of married women. For example, they could contract, hold title, and bring litigation. However, even these rights paled against those held by the men of the times. *See id.* at 498.

[56] If the father had fully gifted the property to the daughter, the son-in-law would have assumed control over it. While the property was not his in title, the husband exercised control by virtue of being the "guardian" of the marital estate, a part of which was the property brought into the marriage by the wife or acquired by her by gift or inheritance during the marriage. The control would continue through the marriage, and through the life of the husband if a child was born of the marriage.

modicum of control and use of property, often in the form of land, without making an outright gift to her.[57] By separating use and control from title, these trusts effectively side-stepped the common law rule which enabled a husband to control property held in his wife's name.[58] Challenges to such trusts were rejected by the equity courts,[59] on the grounds that the donor of the property (the father in the above example) had as an incident of ownership, the absolute right to dispose of it upon conditions and limitations of his choosing.[60] The endorsement of these trusts by the chancery courts created separate estates of equity for married women, estates within which women were able to exercise legal rights of control and use that the common law took from them.[61]

American courts were either slow or inconsistent[62] in following the lead of England's chancery courts, thereby leaving it to state legislatures to develop statutory reforms.[63] And they acted.[64] Struck by a wave of public feminist

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A thorough treatment of how separate estates for women evolved in England using devices such as trusts is found in MARYLYNN SALMON, WOMEN AND LAW OF PROPERTY IN EARLY AMERICA 84-87 (1986).

[57] *See id.* at 85-86.

[58] *See* JACOB, *supra* note 22, at 107.

[59] Such trusts were not recognized by common law courts; only courts of equity provided a supportive forum. *See* WARBASSE, *supra* note 50, at 30.

[60] *See* 2 JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 1111 (7th ed., revised and enlarged by Raymond C. Baldes, 1929).

[61] *See* CLARK, *supra* note 34, at 502.

[62] Marylynn Salmon recounted several reasons why these doctrines and practices emanating from England's chancery courts failed to catch on rapidly in America. *See* SALMON, *supra* note 56. First, several colonies simply chose not to duplicate England's chancery court system and such colonies often failed to adopt equitable rules on women's separate estates. While some common law courts tried to handle questions of equity, they were hampered by a lack of tradition in equity law. *See id.* at 82. Second, the English model was itself still undergoing transition and refinement. Transferring those developments across the Atlantic was understandably slow given the primitive communication and transportation modes of the time. *See id.* at 88. Third, the movement in England arose from the country's moneyed classes, those who had adequate property for the creation of separate estates to be a concern. Given the far less endowed populations in America, the ground for the movement to develop was less fertile. *See id.* Finally she suggested that the difficulties of transplanting feudal English practices into an increasingly commercial America may have accounted for the hesitation. For example, tying large parcels of land into a trust made them either unavailable to be mortgaged against, or inaccessible to creditors of the husband, the marriage partner who was far more likely to be invested in commercial pursuits. *See id.* at 93.

[63] *See* CLARK, *supra* note 34, at 502.

[64] Elizabeth Warbasse described how in the 1820's a movement within state legislatures toward statutory codification became a prelude to the grand reforms reflected in the Married Women's Property Acts. *See* WARBASSE, *supra* note 50, at 57. The codification movement, as described by Lawrence Friedman, grew out the of the notion that the common law was no longer an adequate system and that the European practice of codification offered a better model:

sentiment in the nineteenth century, states began to enact such remedies which collectively came to be known as the Married Women's Property Acts.[65] Although these laws were not intended to and did not by themselves bring women fully to the table with men, they at least helped to institutionalize the notion that married women could legally own and control property.

Popular acceptance of this notion was a building block in bringing common law states closer to the partnership model already embraced by the community property system. Although these laws took on different incarnations depending on the enacting state, one unifying theme was that certain types of property were to be deemed the wife's separate property, subject at least theoretically to her control. More specifically, these laws reserved for married women increased dominion over property they brought into the marriage, as well as, property they acquired during marriage as gifts and inheritances, or in some cases, through earnings.

3. Hawai'i's adoption of the common law and the enactment of the Married Women's Property Act

Even before the statutory adoption of English common law in 1892,[66]

> The smell of feudalism still oozed from the pores of the common law. To men like Jeremy Bentham and his followers in England, and David Dudley Field, Edward Livingston, and others in America, the common law was totally unsuited for an Age of Reason. It was huge and shapeless. Common-law principles had to be painfully extracted from a jungle of words. "The law" was an amorphous entity, a ghost, scattered in little bits and pieces among hundreds of case-reports, in hundreds of different books. Nobody knew what was and was not law. Why not gather together the real principles of law, put them together, and build a simple, complete and sensible code? The French had shown the way with the Code Napoleon. Louisiana was at least something of an American demonstration.

FRIEDMAN, *supra* note 47, at 403.

Warbasse opined that the move to codify the common law necessitated a critical attitude toward the common law thereby creating an environment for creative thought and reform. *See* WARBASSE, *supra* note 50, at 57. And although the codification movement did not ultimately supplant the common law, it did result in the reduction of many legal principles to writing. This process created opportunities to rethink these principles and to make changes as the laws were being written. *See id.* at 63-72.

[65] *See* CLARK, *supra* note 34, at 502–04.

[66] This enactment is presently codified under Hawai'i Revised Statutes section 1-1. It reads:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HAW. REV. STAT. ANN. § 1-1 (MICHIE 1995).

Hawai'i's developing case law reflected a clear patriarchal bent. For example, in *Hookii v. Nicholson*,[67] the Supreme Court of the Hawaiian Kingdom found that "[t]here [could] be no question as to the general principle of law, that the husband [was] exclusively entitled to the society and service of the wife, and that no contract made with the wife in contravention of, or affecting the rights of the husband [was] valid without his consent."[68] In *Maa v. Administratrix of the Estate of Kalua*,[69] the supreme court looked to common law authorities to support its holding that if a husband reduced his wife's *choses in action* (the right to pursue repayment of a personal loan, in this case) to possession, said choses became his entitlement and not his wife's.[70] Likewise, in *Riemenschneider v. Kalaehao*,[71] the court found that a carriage and three horses purchased by a married woman out of the proceeds of the sale of land belonging to her, were nonetheless the property of her husband by virtue of

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The Anglo-American common law actually came to Hawai'i well before the statutory adoption of common law principles in 1892. In 1844, John Ricord was appointed attorney general by Kauikeaouli (Kamehameha III). *See* KUYKENDALL, *supra* note 45, at 236. Under Ricord's leadership, an expanded formal judiciary developed as a response to a growing number of cases that, in other countries, would have been disposed of by courts of equity, probate or admiralty. *See id.* at 242. Under Ricord's advice and with his help, Kekuanaoa, then governor and judge of Oahu, assumed jurisdiction of such cases and began deciding them on principles of American and English jurisprudence. *See id.* As the only trained lawyer in the kingdom, Ricord was called upon to guide Kekuanaoa's decisions which he did by way of written opinions that drew heavily on Anglo-American common and civil laws. *See id.*

[67] 1 Haw. 467 (1856). This case was included in the initial compilation of reported decisions issued between 1847-1857 and originally published in 1857.

[68] *Id.* at 468. The case was based on a challenge by working women, most of whom were married, against the unfair treatment of their employer, merchant tailor C.H. Nicholson. *See id.* at 467-68. The decision reflected the fact that women were already working outside the home and were daring enough to challenge perceived mistreatment by their male employer. The plaintiffs' complaint was largely motivated by decreased wages brought on by Nicholson's introduction of a sewing machine which curtailed the need for hand sewing. *See id.* at 469-70. The women sought a nullification of their employment contract with Nicholson, arguing that their husbands had not specifically consented to their employment contract. *See id.* at 468. The court rejected the argument by inferring consent. *See id.* at 469.

[69] 4 Haw. 201 (1879).

[70] *See id.* at 203-05. The wife, Maa, was married to Kekai at the time that she made a $75 loan to Kalua in 1858. *See id.* at 202. Maa argued that the money was her property and in her possession when she made the loan, and that she was therefore individually entitled to recover the debt. *See id.* In her lawsuit, she sought to avoid the argument that the right to sue belonged to Kekai who died subsequent to the making of the loan. *See id.* The court apparently found that Kekai had in fact reduced all of Maa's money "to his possession" (even though the money was in her hands) by virtue of the marriage and that any loan she made was therefore as her husband's agent and not in her own right. *See id.* at 204. He (or his estate) was thus entitled to repayment and not Maa. *See id.* at 204-05.

[71] 5 Haw. 550 (1886).

the marriage.[72] In *Mutch v. Holau*,[73] the high court even found the husband's control to extend premaritally and voided an engaged woman's premarital (but post-betrothal) transfer of real property to a brother, calling the conveyance a "surreptitious" circumvention of the prospective husband's equitable rights.[74]

Conversely, the court upheld a husband's duty to support his wife as an incident of the marriage even beyond a decision to separate. For example, in *Luka v. Poohina*[75] and *Kekoa v. Borden*[76] the court stated the general rule regarding a married woman's right to necessaries from her husband, and that a wife could contract for necessaries as an agent of her husband. Alimony was considered an extension of the husband's duty to support during marriage, "a consequence of the merger of the legal existence of the wife, in that of the husband."[77]

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[72] *See id.* at 551-53. Interestingly, this was a case between the estate of the wife's first husband (William Harbottle) and the wife's second husband (William Kalaehao). *See id.* at 550. Kalaehao was charged by the deceased's estate for the wrongful conversion of the subject carriage and horses. *See id.* Although the opinion is not clear on this point, the facts suggest that Kalaehao, as the second husband, insisted on the control of the subject horses and carriage in direct challenge to the estate of Harbottle. *See id.* The conflict would not seem unusual given the norms of the time. The issue was reduced to which husband had control, the resolution of which depended on whether the property was the wife's beyond the death of her first husband thereby making it available for control by the second husband. The court found that the property belonged to the wife and was therefore subject to the control of her current husband. *See id.* at 552.

[73] 5 Haw. 316 (1885).

[74] *See id.* at 317. It is not clear from the opinion if the betrothed couple ever married. However, there is allusion to the birth of a child. *See id.*

[75] 5 Haw. 695 (1876). In this case, the wife separated from her husband on account of his adultery. *See id.* Subsequently, she allegedly engaged in adultery and the question was whether her misconduct barred her from further support from her husband. *See id.* at 695-96. The court determined that the "notoriety" of her adultery had to be so severe that it withdrew her from the protection of the coverture. *See id.* at 697. Otherwise, husband was not entitled to an instruction that his wife's adultery served as a defense to his duty to provide necessaries. *See id.*

[76] 5 Haw. 23 (1883). This case posed the interesting situation of a wife's attorney seeking payment of fees from a husband on the theory that the wife's attorney fees were "necessaries". *See id.* at 23. The attorney had defended the wife in a criminal action based on her desertion of her husband. *See id.* at 24.

The court ruled that had there been misconduct by the husband which justified either the wife's separation or divorce from him, she could have brought the appropriate action and requested an award of alimony or post-separation support. *See id.* at 24. However, the case at bar failed to present such facts thus resulting in a denial of the attorney's petition. *See id.* at 24-25.

[77] Kaelemakule v. Kaelemakule, 33 Haw. 268, 270 (1934). This was part of a larger quote which read in pertinent part:

> The common law imposes upon the husband the duty to support his wife so long as she is free from conjugal fault and our statute recognizes such duty. Speaking of this

The first attempts to codify rules relating to marriage and property adopted and further institutionalized this patriarchal bent. The Civil Code of the Hawaiian Islands was passed in 1859 and included a section which read "[t]he wife, whether married in pursuance of this article or heretofore, or whether validly married in this kingdom or in some other country, and residing in this, shall be deemed for all civil purposes, to be merged in her husband, and civilly dead."[78] As a result, she could not, as a general principle, enter into contracts or dispose of property without her husband's consent.[79] At the same time, he was personally responsible for damages resulting from tortious acts by the wife.[80] Upon marriage, the law made the husband the "virtual owner" of all movable property belonging to the wife before the marriage as well as movable property acquired during the marriage.[81] Further, he could control and enjoy the profits of the wife's fixed or immovable property which she either owned prior to the marriage or acquired during the marriage.[82] His duty to support his wife was also affirmed in the Hawaiian Civil Code.[83]

By 1888, however, the move to reverse the legal disabilities of married women came to the Hawaiian Kingdom through the adoption of Hawai'i's incarnation of the Married Women's Property Act.[84] These laws were described as "destroy[ing] the common law fiction of the unity of husband and

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common-law duty it was said by Chief Justice Brickell in *Smyley v. Reese*, 53 Ala. 89, 96: "The common law compelled him" (the husband) "to maintain his wife—to supply her with necessaries suitable for her situation, and corresponding with his social position, and the degree of his fortune. If the husband neglects this duty the wife may on his credit, against his will, obtain necessaries, and he will be liable for them. In such case she is presumed to have authority to bind him, but the presumption is made only to enforce a performance of duty. Schouler's Dom. Rel., 85; 2 Kent. 128; Tyler on Inf. and Cov., 340. This duty of the husband did not arise from, nor was it solely dependent on, the common-law principle, that marriage was a gift of the husband of the wife's estate—that he thereby became vested with an ownership qualified or absolute, of her property, and rights of property. The duty was as obligatory on the husband, to whom the wife brought no portion, as on him who had received the largest fortune. It was a consequence of the merger of the legal existence of the wife, in that of the husband."

Id.

[78] The Civil Code of the Hawaiian Islands, § 1287 (1859).

[79] *See id.*

[80] *See id.*

[81] *See id.* § 1286.

[82] *See id.*

[83] *See id.*

[84] These laws were codified as Chapter 175, §§ 2993 - 3013 of the Revised Laws of Hawaii, 1925.

wife."[85] Under these laws, married women in Hawai'i retained their separate real and personal property throughout the marriage, free from the control of their husbands.[86] Among other things, they could enter into contracts,[87] be appointed "executrix, administratrix, guardian or trustee",[88] sue and be sued individually,[89] work or transact business on an account separate from their husbands,[90] and have their separate property protected from attack by their

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[85] First Nat'l Bank v. Gaines, 16 Haw. 731, 733 (1905).

Prior to 1888, Hawai'i's statutes supported the common law tradition of giving to the husband dominion of all property, as well as, the concomitant obligation to support. Section 1286 of the Compiled Laws of the Hawaiian Kingdom (1884) delineated this control and obligation:

> § 1286. The husband, whether married in pursuance of this article, or heretofore, or whether validly married in this Kingdom or in some other country, and residing in this, shall be accountable in his own property, for all the debts contracted by his wife anterior to, and during marriage; to any of which debts, he may set up the same defense she could have interposed had she remained sole. The husband shall be bound in law to maintain, provide for, and support his wife during marriage, in the same style and manner in which he supports and maintains himself. The husband shall, in virtue of his marriage, and in consideration of the responsibilities imposed on him by law, be the virtual owner, except otherwise stipulated by express marriage contract, of all movable property belonging to his wife anterior to marriage, and of all movable property accruing to her after marriage; over all of which movable property he shall, unless otherwise stipulated by contract, have absolute control for the purposes of sale or otherwise, and the same shall be equally liable with his own for his private debts. The husband shall in virtue of his marriage, unless otherwise stipulated by express contract, have the custody, use and usufruct, rents, issues and profits of all property of a fixed and immovable nature, belonging to his wife before marriage, or accruing to her after marriage; and he may, with her written consent, rent or otherwise dispose of the same for any term not exceeding the term of his natural life: provided, that in case his wife shall first die, the husband legally married as aforesaid, shall cease to have control over the immovable and fixed property of his wife, and the same shall immediately descend to her heirs as if she had died sole, unless there happens to be legitimate issue of the marriage within the age of legal majority; in which case the husband shall continue to enjoy a *curtesy* in said immovable or fixed property, until such issue shall attain majority, when the same shall descend to the heir or heirs of the body of the wife. The immovable and fixed property of the wife shall not be liable to be sold for the payment of the husband's debts, whether contracted in his own behalf solely, or in support of or for the use of his wife after marriage. But such immovable and fixed property may be legally sold on execution to satisfy the debts contracted by the wife before marriage, if no property of the husband be found to satisfy the same.

Compiled Laws of the Hawaiian Kingdom, § 1286 (1884).

[86] *See* Revised Laws of Hawai'i § 2993 (1925) (current version at HAW. REV. STAT. ANN. § 572-25 (Michie 1997)).

[87] *See id.* § 2994 (current version at HAW. REV. STAT. ANN. § 572-22 (Michie 1997)).

[88] *Id.* § 2996 (current version at HAW. REV. STAT. ANN. § 572-26 (Michie 1997)).

[89] *See id.* § 2998 (current version at HAW. REV. STAT. ANN. § 572-28 (Michie 1997)).

[90] *See id.* §§ 2995 and 3003, 1925 Revised Laws of Hawai'i 1071, 1072.

husbands' creditors.[91]

Even under these laws, however, a wife's dominion was not unfettered. For example, a significant limitation on a married woman's ability to control her property was that she could not validly sell or mortgage her real estate without the written consent of her husband.[92] Likewise, she could not make contracts for personal service without her husband's written consent.[93] With time, some of these limitations disappeared.[94]

C. Embracing the Partnership Mode: Hawai'i as a Community Property State—A Four Year Fling

With the evolution of gender roles well underway, Hawai'i in the 1940's was positioned to consider adopting a community property scheme that, by its general reliance upon a model of equal partnership between spouses, would further acknowledge and institutionalize women's increasingly independent and powerful place in society and the family. Hawai'i took that step in 1945 when it enacted legislation to become a community property state. In the Community Property Act of Hawai'i of 1945, Hawai'i's territorial legislature recognized "the partnership interests of the husband and the wife in accumulations subsequent to marriage."[95] In passing the bill out of committee, the territorial house judiciary committee wrote:

> In theory the marital relationship in respect of property acquired during its existence is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity. The avowed object and purpose of the community system is to place husband and wife on an equal footing as to their property rights. The community estate is created by law as an incident of marriage. The property owned by each spouse before marriage remains his or her separate estate, while all that is acquired during coverture otherwise than by gift, descent, or devise becomes community property.[96]

In reviewing the community property law, the Hawai'i Supreme Court affirmed the notion that "the wife's labors in the home are substantially commensurate with the efforts of the husband in marital economic gain."[97] It

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[91] *See id.* § 2999 (current version at HAW. REV. STAT. ANN. § 572-23 (Michie 1997)).

[92] *See id.* § 2993 (this prohibition was repealed in 1925).

[93] *See id.* § 2994 (this prohibition was repealed in 1945).

[94] *See, e.g., supra* notes 92-93 and parenthetical explanations. However, the "revolution" was far from over. In the decades that followed, progress was slow, hard fought and incremental. *See infra* notes 107, 118, 122, 123 and accompanying text. The struggle continues today.

[95] Bulgo v. Bulgo, 41 Haw. 578, 586 (1957).

[96] *Id.*

[97] *Id.* This review of the community law system actually occurred seven years after the

traced the Spanish origins of the community property system noting that "[t]he basic idea of the Spanish law was that upon marriage the husband and wife became partners as to subsequent 'gains and acquests' with the profits of the partnership to be divided equally upon its dissolution."[98] The court observed that while each spouse retained ownership of his or her separate property, "each [spouse] unselfishly and unhesitantly had at heart the success and well-being of the marital union and that, accordingly, the fruits and income of all property of each naturally were to be devoted to the benefit of the marital union."[99]

Even while accepting the precepts of equal partnership, however, Hawai'i's incarnation of community property tended to favor the husband, at least in its paternalistic view of him as the "guardian of the coverture." For example, the husband controlled the management of all community property that did not stand in the wife's name.[100] He also maintained the obligation to support his wife and children.[101] Interestingly, the legislature also retained its laws on dower and curtesy, thereby keeping in place the concept that a husband's earnings could be deemed to belong to him rather than to the marriage except for his general obligation to support his family. Reconciling this with the community property notion that the labors and fruits of the marriage belonged to the partnership and not to the individual spouses posed a difficult tension.

The new scheme and the paradigm shift it presented was nonetheless important enough to move the territorial bar to educate itself and the public on what it all meant. At the suggestion of the territorial attorney general, the bar president commissioned a panel of attorneys to review and analyze its provisions.[102] From the ensuing report came a series of seven articles that ran

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system had already been repealed. The court's review was necessitated by the facts of the case which concerned holdings and liabilities subject to the territorial community property laws in effect between 1945-1949. In this case, the appellant argued that the community property law resulted in an unconstitutional taking of his property to the extent that it mandated an equal split of income arising from property that appellant owned solely and separately before the April 12, 1945 effective date of the law. *See id.* at 580. The court rejected appellant's argument, noting that husbands, even under the community property scheme, maintained control over the community's income during the marriage. *See id.* at 587.

[98] *Id.* at 581.

[99] *Id.* at 581-82.

[100] 1945 Haw. Sess. Laws 311, 314-15 (repealed 1949).

[101] *Id.* § 12391.13(h) (repealed 1949).

[102] C. Nils Tavares, then Attorney General for the Territory of Hawai'i, asked the Bar Association of Hawai'i to provide a summary and analysis of the community property law. Heaton Wrenn, who was president of the bar, appointed Livingston Jenks, Eugene H. Beebe and Eugene K. Kai to perform the study with the additional charge that it be written in a form that could be easily understandable by the public. The report, entitled "Hawai'i's Community Property Law, An Analysis by a Special Committee of the Bar Association of Hawai'i," was completed on June 13, 1945 and included a section of anticipated questions and answers.

in the *Star Bulletin* in June 1945.[103] In addition, at the prompting of concerned Honolulu attorneys, the University of Hawai'i Board of Regents voted to recommend action to seek a property law expert from the mainland to give a series of lectures on community property.[104]

Only four years after passage, however, the community property law scheme was repealed. During the 1949 legislative session, the primary motivation for adopting the community property scheme became clear. Far from seeking some modicum of equality, it was evident that the Community Property Act had been adopted primarily to take advantage of federal tax provisions which permitted husbands and wives to split incomes in community property jurisdictions; when the Internal Revenue Code was amended in 1948 to permit spouses to split income even in non-community property states, Hawai'i's "need" to enact a community property law evaporated.[105]

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[103] These articles, entitled "Facts on Community Property Law - Analyzed for Information of the Public", ran in the *Honolulu Star Bulletin* on June 11, 1945 through June 14, 1945 and June 18 through June 20, 1945. These articles summarized the key provisions of the community property scheme and, using a question and answer format, explained the practical effects of the new law.

[104] *See Regents Recommend Lecture Series on New Property Law*, HONOLULU STAR BULLETIN, June 12, 1945, at 3.

[105] *See* JOURNAL OF THE SENATE, TWENTY-FIFTH LEGISLATURE OF THE TERRITORY OF HAWAI'I, 1579 (1949).

Legislative committee reports *prior* to the passage of the community property laws were much more subtle in suggesting tax advantages as the prime if not sole reason for adopting a community property system in the territory. A casual reading of these reports suggests that while tax considerations were on the minds of the drafters, they did not constitute the sole or even the most important reason. Take, for example, this paragraph from the territorial senate judiciary committee's report:

> The changes in property rights would be brought about by the bill are recommended because they recognize the partnership interests of the husband and wife in accumulations subsequent to marriage. Eight states have community property laws. In community property jurisdictions married couples are able to divide their incomes for income tax purposes, with resulting savings.

AN ACT RELATING TO TAXATION, AND AMENDING §§ 5151 AND 5252 OF THE REVISED LAWS OF HAWAI'I 1945, JOURNAL OF THE SENATE, TWENTY-THIRD LEGISLATURE OF THE TERRITORY OF HAWAI'I, 931 (1945).

It should be noted that the decision to adopt the community property scheme in order to benefit from then existing federal tax provisions was not unique to Hawai'i. Nebraska, Michigan, Oklahoma, Oregon and Pennsylvania were likewise motivated. *See* WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 89 (1971). In addition, community property bills were introduced but failed to pass in Alabama, Illinois, Indiana, Massachusetts, New Hampshire and Wisconsin. *See Note, Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332, 332 n.4 (1950).

The specific tax advantage arose from provisions allowing each spouse in a community property state to file a separate tax return declaring as income one-half of the marital community's total income even if the income was earned by only one spouse (usually the

Perhaps more telling was a Senate Judiciary Committee comment which described a clash between what the law seemingly achieved and what the community wanted or was ready for: "The institution of community property is foreign to the history and mores of Hawai'i. If community property were to continue, it would be necessary to revise the present provisions of Chapter 301A extensively and perhaps to re-examine the laws relating to dower and curtesy, joint tenancy, and other laws."[106] Thus, while the language and the concepts of the modern partnership model were being used, Hawai'i history ultimately records a lukewarm regard for them.[107]

Interestingly, Hawai'i law still contains a section on community property which was enacted to guide the disposition of property that remained "community" after the 1949 repeal.[108] This vestige of the community property law, which was passed concomitantly with the 1949 repeal, has offered a prototype for the partnership model for almost fifty years. However, restrictions on its application and its obscurity since the repeal of the community property scheme severely limited its influence on more recent developments of property division. Nonetheless, the four year experiment may well have had some impact on local sensibilities in the years that immediately followed.

One feature of the community property system in Hawai'i foreshadowed property division incident to divorce as it exists today. Unlike some

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husband). By halving the community income, each spouse was able to get into a lower tax bracket. While this did not yield much benefit to a lower or moderate income couple, its advantages were considerable for those with high incomes. *See* DEFUNIAK & VAUGHN, *supra* this note, at 89.

Changes in the Internal Revenue Code in 1948 ended the movement of states to the community property system, a migration that began in 1939 when Oklahoma experimented with an elective system which allowed married couples to decide whether to subject themselves to community property principles. *See id.* at 90-91.

[106] DEFUNIAK & VAUGHN, *supra* note 105, at 90-91.

[107] Community property and its underlying partnership principles served as a counter against patriarchal order. By asserting that community property was "foreign to the history and mores of Hawai'i," the legislature rejected this counter, expressing instead its preference for patriarchal values.

[108] This vestige of the community property scheme is found in Hawai'i Revised Statutes, Chapter 510. Seeking to avoid confusion over how to treat property that had been subject to community property principles during the years of 1945-1949, the territorial legislature determined that such property would continue to be treated as community property unless subsequently converted to separate property. Statutory provisions reflecting community property principles were thus retained to govern the disposition of such property, and remain viable law to this day. *See also* An Act to Repeal and Amend Laws Relating to Community Property, Ch. 301 A, 1949 Haw. Sess. Laws 629 *et seq.* (Act 242, as set forth in the 1949 Session Laws, both repealed the community property scheme and put into place what is now known as Hawai'i Revised Statutes Chapter 510. Sections 1 and 2 described the purpose for retaining a vestige of the community property scheme).

community law jurisdictions that equally divided community property as a starting point, Hawai'i mandated that community property be divided "in such proportions as such court, from the facts of the case, shall deem just and equitable."[109] No guidance was given on what an "equitable" division was and it was assumed that a court could select from a wide range of possible choices, limited only by whether its choice was fair in light of relevant circumstances.[110]

This was a significant historical development in that it represented the first clear grant of plenary judicial power to divide property incident to divorce.[111] Although this grant disappeared with the repeal of the community property

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[109] Revised Laws of Hawai'i § 12391.14 (1945) (repealed 1949).

[110] "Fair" is a relative term. In describing early property division statutes, Brett Turner pointed out the difficulties arising from giving judges too much discretion in deciding what was fair. The norms and social forces at the time tended to turn the meaning of "fair" into something that meant "pro-husband." *See* BRETT TURNER, EQUITABLE DISTRIBUTION OF PROPERTY 7-8 (2d ed. 1994). As an example, Turner recounted how a "surprising number of decisions" considered it "liberal" to award a wife a third of the marital estate at divorce, and that an equal division was reserved for only the most unusual cases. *See id.* at 8.

[111] Previously, Hawai'i, like other common law jurisdictions, empowered judges to compel the husband to provide such suitable allowance for the wife, for her support, as the judge deemed just and equitable. *See* Revised Laws of Hawai'i § 12226 (1945) (current version at HAW. REV. STAT. ANN. § 580-47 (Michie 1997)). This was generally construed as giving courts the power to order alimony as a post-divorce extension of the husband's duty to support his wife. *See* CLARK, *supra* note 34, at 220-21.

As stated earlier, common law property division at divorce was essentially owner-driven. *Cf.* Revised Laws of Hawai'i § 12233 (1945) (This provision entitled the wife to property in her name at divorce. However, as written, the provision appeared to reserve this entitlement for the wife only if the husband's adultery or "other offense amounting thereto" caused the divorce. This was ultimately amended in 1955 with the adoption of Hawai'i's "equitable distribution" statute. *See infra* notes 112-20 and accompanying text). But the court which had jurisdiction of the divorce was not empowered to divide property within the divorce action. *See* H. R. STAND. COMM. REP. NO. 356, 28th Terr. Legis., Reg. Sess. (1955), *reprinted in* HAW. H. R. JOURNAL 697 (1955)). In fact, courts settled property matters by way of extra-divorce proceedings that were generally available for matters of property disposition. *See id.* For example, if real property had to be divided, the parties would file a separate action to partition the parcel. *See id.* Likewise, an action would need to be initiated to divide personal property. The legislature was clearly concerned about this grossly inefficient process and sought to streamline it by empowering domestic relations judges to adjudicate property division as part of the divorce action. *See id.*

It should also be noted that although the domestic relations courts were not specifically empowered to divide property until the mid-1900's, they were empowered to make lump sum alimony awards, or "alimony in gross" that partially had the effect of property distributions. Thus, if a wife was found to have contributed to the acquisition of the husband's property and was therefore entitled to compensation for her efforts, she could be entitled to a lump sum distribution which, while couched in alimony terms, amounted to a share of her husband's property. *See* Nobrega v. Nobrega, 13 Haw. 654, 658-60 (1901) and Nobrega v. Nobrega 14 Haw. 152, 155-58 (1902).

law in 1949, it resurfaced six years later in a more expansive form. This reemergence is described in the next section.

D. Adopting an Equitable Distribution Scheme and Allowing Family Court to Divide Property

With the demise of the short-lived community property system in 1949, Hawai'i restored its common law system of property ownership which, in the context of property distribution, favored the spouse who was better-positioned to own and acquire property in his or her name. However, in 1955, Hawai'i reopened the door to change by enacting an amendment which reinstated the court's power to make an equitable distribution of property. Specifically, the territorial legislature authorized the court:

> [T]o finally divide and distribute the estate, real, personal or mixed, whether community, joint, or separate, in such proportion as shall appear just and equitable, having regard to the respective merits of the parties, to the ability of the husband, to the condition in which they will be left by such divorce, to the burdens imposed upon it for the benefit of the children of such marriage, and all circumstances of the case.[112]

With this amendment, Hawai'i joined the swelling ranks of "equitable distribution" jurisdictions which gave judges broad discretion to assign to either spouse property acquired during marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of both the financial and non-financial spousal contributions.[113] The modern view of equitable distribution systems recognizes that "marriage is essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce."[114]

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[112] 1955 Haw. Sess. Laws 60 (current version at HAW. REV. STAT. ANN. § 580-47 (Michie 1997)).

[113] *See* JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION 1-6 (1989).

Herbert Jacob noted that the development of equitable distribution statutes began in Kansas and Oklahoma in the late 1800's. Kansas in 1889 passed legislation that read as follows:

> [With regard to] such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such a sum as may be just and proper to effect a fair and just division thereof.

JACOB, *supra* note 22, at 114.

[114] GREGORY, *supra* note 113, at 1-6.

That Hawai'i was ready to give a domestic relations judge the discretion to fashion an equitable division after considering all relevant factors seemed clear. Whether the legislature or Hawai'i's judges had actually recognized and accepted the modern view of marriages as partnerships was less clear. Thus, this zone of discretion was, perhaps initially, only a theoretical opportunity to apply partnership principles to the division of property at divorce. It should be remembered that divorce was still fault-based at this time and thus courts could consider, among other things, the misconduct of a spouse regardless of whether it impacted on the finances of the marriage.[115]

Nonetheless, by adopting this amendment, the legislature in 1955 signaled an emerging awareness of an evolving social order. For example, in its committee report, the House Judiciary Committee recognized the entitlement of a wife to a just share of a family business which she helped establish and contributed to, and sought to give her access to the value due to her by way of a property settlement.[116] In the same breath, it recognized that husbands, as well as wives, were entitled to a fair property settlement based on an array of factors.[117] This was a departure from the traditional notion that along with their control over property, husbands had a duty to support, a duty that extended beyond marriage.[118] However subtly, equality was displacing hierarchy[119] as the guiding principle in property division. It suggested at least a quiet erosion of traditional gender-based boundaries, creating an opportunity to think about spousal roles and responsibilities in more dimensions than were previously possible.

Moreover, the new legislation, on its face, allowed judges to consider and divide all property regardless of its form, or the technical or legal manner in which it was held.[120] Community property, as well as separate and jointly held

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[115] This is to say that judges and litigants could consider factors that had little to do with partnership principles. Lenore Weitzman described how under the fault-based divorce laws, a litigant was encouraged to detail or even exaggerate the grievous behavior of her spouse as a means to punish him by way of a larger property award. *See* WEITZMAN, *supra* note 4, at 28. No-fault reformers argued that justice was better served if the judicial system considered the economic situation of the spouses rather than culpability for bad behavior. *See id.* at 29.

[116] *See* S. STAND. COMM. REP. NO. 595, 28th Terr. Legis., Reg. Sess. (1955), *reprinted in* HAW. S. JOURNAL 1955, Spec. Sess. (1956) 632 (1955).

[117] *See id.*

[118] However, it should be noted that among the factors that courts had to consider was the "ability of the husband" with no corresponding reference to a wife's ability. Further, the support and maintenance provisions continued to refer only to a husband's obligation to support both wife and children. *See* Revised Laws of Hawai'i § 324-37 (1955). While forward steps were being made, the transformation was far from complete.

[119] *See* JACOB, *supra* note 22, at 5.

[120] In passing House Bill No. 499 (the bill which ultimately became Hawai'i's equitable distribution statute), the Senate Judiciary Committee wrote: "The purpose of this bill is to confer upon the Judge . . . the power to make property settlements between the parties of *all*

property, became subject to distribution. In doing so, Hawai'i became an "all-property" jurisdiction as contrasted to "dual-property" systems which identified certain categories of property to be exempt from division.[121] In one fell swoop, this took from the dominant spouse the use of title and control of property as an easy shield against post-divorce property division. Nothing was exempt. In maximizing the pool of property from which an equitable division could occur, the legislature enlarged the font from which courts could draw to duly address the needs of each divorcing spouse. By so doing, it moved toward the concept of marriage as a partnership with an emphasis on its sharing aspects. For in considering all property for division, the legislature affirmed the notion that spouses should demonstrate their commitment to the marital partnership by dedicating resources to it, including property that might be considered separate. Therefore, it was conceptually appropriate to make some assumptions that those resources belonged to the unit rather than to its individual parts, and that with the dissolving of the unit came the need to divide these collectively shared resources, with little regard to how title was held.

Whether the legislature or the courts actually looked at both spouses as equal partners in 1955 was questionable.[122] After all, Hawai'i's equitable

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property, real, personal, or mixed, whether held as community, joint or separate property." S. STAND. COMM. REP. NO. 595, 28th Terr. Legis., Reg. Sess. (1955), *reprinted in* HAW. S. JOURNAL 1955, Spec. Sess. (1956) 632 (1955)(emphasis added).

[121] *See* GREGORY, *supra* note 113, at 2-4, 2-22.

[122] The Hawai'i Supreme Court, in its *Bulgo* decision, reviewed the community property scheme which existed in Hawai'i ten years before. *See* Bulgo v. Bulgo, 41 Haw. 578 (1957). After extolling the virtues of that system, the court took a puzzling turn in its opinion, which suggested a misunderstanding of how the system should have worked and may have revealed a perspective that reinforced the paramount position of the husband in a marriage.

In responding to the husband's argument that the community property scheme was unconstitutional to the extent that it took from him half of the income generated from his premarriage separate property, the court replied almost apologetically:

> No property is taken from the husband and it will be noted he has the administration and control of the community-property income, whether it be income from his own property . . . or income from the wife's separate property or . . . income from the efforts of the labor of the community. As a rule it becomes of importance only when the community is terminated. *As has been aptly said, a community is a partnership which begins only at its end.*

Id. at 587 (emphasis added).

To support its statement, the court drew from a 1907 United States Supreme Court decision, *Garrozi v. Dastas*, 204 U.S. 64, 79, in which the justices reviewed a case from Puerto Rico, a community property jurisdiction.

> The rights of the wife are dormant during the marriage, because the husband is charged to watch over and conduct the affairs of the conjugal society. But this right, which is inert, as long as the husband is at the head of the affairs of the community, becomes active when the marital authority ceases to exist. The wife is like a silent partner, whose rights arise and reveal themselves when the partnership ceases.

Id. at 79.

distribution statute was enacted a few years prior to the national struggle toward gender and race equality which began to foment in the 1960's.[123] Yet, the doors were beginning to open. Thus, the 1955 legislation was significant not only in how it enabled courts to adjudicate an equitable and just property division, but in how it reflected a change in attitude and perception, a start down the road that took us to where we are.

Finally, in a way that could not have been anticipated at the time of its passage, the equitable distribution statute was vital to the ultimate adoption of the partnership model by becoming the center of a storm between the state's two appellate courts beginning in the 1980's. It was through this long, sometimes frustrating, struggle that the partnership model was finally crystallized. This exchange will be described in Section III.

Thus in the court's eyes, the system adopted by the territorial legislature between 1945 and 1949, reserved the fruits of partnership for the dissolution of the marriage. How the court reached its conclusion remains an enigma in light of the language of the community property statute which clearly distributed power to both spouses to be exercised throughout the marriage.

[123] An account of U.S. Congresswoman Patsy Mink's struggle to take the bar examination and find employment after graduating from the University of Chicago School of Law in the 1950's sheds light on the difficulties experienced by even highly trained professional women during this period:

> John [Congresswoman Mink's husband] found a position with the Hawaiian Sugar Planters Association, while Patsy first had to prove that she was eligible to take the Hawai'i bar examination. Under a domicile law that required a woman to take the residency status of her husband, Patsy was now considered a resident of Pennsylvania and would have to reestablish her Hawai'i residency. Irate, Patsy challenged the sexist statute. The attorney general then reversed his earlier denial and ruled that since she had not ever physically resided in Pennsylvania, she had not assumed her husband's domicile.
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> Even with her admission to the bar in June 1953 Patsy failed to obtain work as an attorney in the private or public sector. Prospective employers believed that attorneys were expected to work long hours and that women "should not be out late at night." When interviewers learned that she had a child, they rejected her without further consideration, even if she explained that she had adequate care for [her daughter] Wendy. They were concerned that she might have "another child." With help from her father, Patsy turned to solo practice. She opened her law office, furnished with borrowed pieces, in downtown Honolulu. Despite news stories announcing that she was the first Japanese female admitted to practice law in the Territory of Hawaii, few clients materialized. To augment her income and to fill time, she took court-appointed cases and lectured in business courses at the University of Hawaii. Her early cases were those that established law firms traditionally avoided: criminal, divorce, and adoption cases.

Esther K. Arinaga & Rene E. Ojiri, *Patsy Takemoto Mink*, *in* CALLED FROM WITHIN, EARLY WOMEN LAWYERS OF HAWAI'I 261 (Mari J. Matsuda ed., 1992).

E. Passing Through the Tumultuous Sixties —The Divorce Revolution and the UMDA

The turmoil of the sixties created a fertile environment for social change which in turn compelled a retooling of the law. A major push for female representation and power in the workplace merged with changing attitudes toward the longevity of marriages during this tumultuous decade.[124] Together they forced a serious examination of the nature of property within marriage and how that property should be distributed when a marriage dissolved. As women's earning power increased, their economic contributions could not be denied and needed somehow to be acknowledged. At the same time, assumptions regarding a wife's dependence on her husband were being replaced by the belief that women as well as men were capable of financial self-sufficiency, thereby raising challenges to the way we thought of alimony and our objectives for awarding it.[125] Any move to reform divorce law therefore needed to include the reevaluation of the place of alimony while defining a cogent theory of property division that reflected emerging cultural realities.

In the mid-sixties, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") began to generate a code of uniform laws regarding marriage and divorce, which became known as the Uniform Marriage and Divorce Act ("UMDA").[126] This assembling of experts was an attempt to organize ideas and capture the energy emanating from the push toward divorce reform which bubbled in the 1960's. One of the areas requiring work was property division which was characterized as "in even worse condition" than the then-extant confusion over divorce in general.[127]

Professor Robert J. Levy of the University of Minnesota Law School was selected to provide a preliminary analysis with recommendations to help direct the work of the NCCUSL's Special Committee on Divorce. Levy quoted the following from a 1963 report of the Committee on Civil and Political Rights of the President's Commission on the Status of Women: "Marriage is a

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[124] *See* TURNER, *supra* note 110, at 9-10.

[125] In the late 1960's, Samuel P. King, who later became senior judge of the United States District Court for the District of Hawai'i, was the state circuit court judge assigned to handle all domestic relations cases in Honolulu. In an article that called him "Hawaii's foremost authority on divorce," Judge King said "[a]limony should be used for rehabilitation purposes, not as a lifetime annuity for a wife." He added, "in 1969, it should be viewed as a short-term stop-gap measure. It certainly shouldn't provide a woman with a lifetime insurance policy unless she is in ill health." Drew McKillups, *Judge Calls Hawaii Alimony Law Unfair*, HONOLULU ADVERTISER, May 13, 1969, at C-2.

[126] *See Prefatory Note* to UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 147 (1968).

[127] ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 135 (1969).

partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind . . . ."[128] Noting both the burgeoning drive to erase fault as a basis for divorce and the dramatic rise of women in the work force after the second World War, Levy concluded that basing property division on fault or title ignored the realities of American family life.[129] He found it odd that states restricted the use of fault in the divorce itself in order to reduce acrimony but allowed the parties to allege fault in the same proceedings to justify a higher property award.[130] His objections to title-based property division drew from its tendency to mask the contributions, increasingly economic, that wives made to the acquisition of property nominally owned by husbands.[131]

The diminution of alimony as the primary source of post-divorce support corresponded with the emerging importance of property division incident to divorce.[132] With the growing acceptance of marriage as a partnership and its expansive view of spousal partnership contributions, greater attention had to be given to effectuating a fair return on those contributions by way of appropriate property awards, and the UMDA sought to reflect this.[133]

Observing that many jurisdictions of the era, including Hawai'i, already had statutes giving courts the discretion to effectuate a "fair" distribution of property, Levy suggested that an appropriate next step was to guide judges toward relevant factors. He included the duration of the marriage, each spouse's contributions, both economic and non-economic, each spouse's "mode" of life (i.e., their individual circumstances), and the extent of each spouse's separate holdings.[134] Such an approach would help curb any problem

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[128] *Id.* at 164 (*quoting* THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT'S COMM'N ON THE STATUS OF WOMEN 18 (1963)).

[129] *See id.* at 165.

[130] *See id.*

[131] *See id.*

[132] *See Prefatory Note* to UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 149 (1968).

[133] The UMDA's Prefatory Note reads in relevant part:

> The Act's elimination of fault notions extends to its treatment of maintenance and property division. The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership. The Act authorizes the division, upon dissolution, of property acquired by either spouse during the marriage (except for gifts and inheritances) as the *primary means of providing for the future financial needs of the spouses.* Where the marital property is insufficient for this purpose, the Act provides that an award of maintenance can be made to either spouse under appropriate circumstances *to supplement* the available property.

Id. (emphasis added).

[134] *See* LEVY, *supra* note 127, at 169.

with "judicial discretion turned loose cannon," and focus judges on appropriate specific factors.[135]

Beyond trying to identify relevant considerations, the NCCUSL drafted a section on property division that supported a vision of marital partnership akin to that already held by community property states. In its initial draft of Section 307 which dealt with the disposition of property, the NCCUSL distinguished marital property (all property acquired by either spouse during the marriage except, primarily, for gifts and inheritance) from separate property, recommending a return of the latter to the owner spouse and an equitable division of "community" or marital property.[136] Consistent with its vision of the marital partnership, the NCCUSL topped its list of relevant considerations with the "contribution of each spouse to [the] acquisition of the marital property, including contribution of a spouse as a homemaker."[137]

This draft provision, issued in 1970, provided one of several focal points for strong dissension from the Family Law Section ("FLS") of the American Bar Association.[138] The refusal of the FLS to support the UMDA in general and

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[135] *See* Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 826 (1990).

[136] *See id.* at 827. The relevant portions of the NCCUSL's comment to the original section 307 of the UMDA reads:

> (T)he court is directed first to set apart to each spouse all of his or her property that is not defined as marital property by subsection (b), and secondly to divide the marital property between the parties in accord with the standards established by this section. The court may divide the marital property equally or unequally between the parties, having regard for the contributions of each spouse in the acquisition thereof, the length of the marriage, the value of each spouse's non-marital property, and the relative economic position of each spouse following the division. The court is directed not to consider marital misconduct, such as adultery or other non-financial misdeeds, committed during the marriage, in making its division
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> . . . .
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> Subsection (c) creates a presumption that all property acquired after marriage and prior to a decree of legal separation is marital property. In the absence of contrary evidence this presumption will be controlling, regardless of the manner in which title is held by the spouse. A spouse seeking to overcome the presumption has the burden of proof on the issue of identification. The presumption is overcome by a showing that the property (1) was acquired prior to the marriage, was the increase in value of such property, or was acquired after the marriage in exchange for such property; (2) was acquired after the marriage by gift, bequest, devise or descent or in exchange for property so acquired; (3) was acquired after the entry of a decree of legal separation; or (4) was designated as non-marital property by a valid agreement of the spouses, all as provided in sub-section (b). The phrase "increase in value" used in subsection (b) (5) is not intended to cover the income from property acquired prior to the marriage. Such income is marital property.

Id at 827 n.99.

[137] UNIF. MARRIAGE AND DIVORCE ACT § 307(1), 9A U.L.A. 239 (1968).

[138] A number of reasons have been mentioned to explain the sometimes heated disagreement between the NCCUSL and the FLS. Some have attributed it to personalities and egos between

the proposed property division provision in particular, moved the NCCUSL to develop an alternative version of section 307, now known as Alternative A.[139] This alternative, which allowed judges to equitably divide *all* property and not just marital property, sufficiently placated the FLS and helped bring the UMDA to a narrow endorsement by the ABA in 1974.[140]

How the UMDA brought Hawai'i closer to its embrace of the partnership model is open to conjecture. The fact that it elevated to a national debate a uniform code section on property division modeled in part on community property principles must have had some impact in molding local thought and discussion.[141] In fact, a year after the American Bar Association endorsed the UMDA, the *Honolulu Advertiser* ran a series of articles on divorce in Hawai'i.[142] The series drew largely from a melange of interviews with judges, attorneys, and parties of divorce. Among those quoted was Thomas Rice, then

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the leadership of two powerful institutions. *See* Harvey L. Zuckman, *The ABA Family Law Section v. The NCCUSL: Alienation, Separation, and Forced Reconciliation over the Uniform Marriage and Divorce Act*, 24 CATH. U. L. REV. 61, 62-63 (1974). Others have pointed to the differences in world views, with the NCCUSL, consisting primarily of academics, and the FLS, representing frontline family law practitioners, unable to bridge the distance. *See* Peter Severeid, *Increase in Value of Separate Property in Pennsylvania: A Change in What Women Want?*, 68 TEMP. L. REV. 557, 578 (1995). Still others describe the FLS's fear of shifting paradigms, moving away from the growing status quo of equitable distribution of all property and toward an adoption of a system that was closer to that adopted by the small minority of community property states. *See id.*

[139] *See* Sevareid, *supra* note 138, at 579. Alternative B of section 307, which was closer to the original draft, was adopted to meet the needs of community property states which preferred its system to the "hotchpot of assets" contemplated in Alternative A. *See* UNIF. MARRIAGE AND DIVORCE ACT § 307(2) cmt., 9A U.L.A. 239 (1968).

[140] *See* Sevareid, *supra* note 138, at 579.

[141] Herbert Jacob wrote:

> Almost no state fully adopted the property provisions of the NCCUSL's Uniform Marriage and Divorce Act. Some provisions won wider acceptance than others; some spawned different responses to the same problems. However, the adoption of the marital property concept clearly gathered momentum after the NCCUSL first suggested it in 1970 . . . [w]hile we have no direct documentary evidence of a link between the NCCUSL's actions and state adoption of these provisions, it is reasonable to conclude that the model provided by the Uniform Marriage and Divorce Act played a role in the diffusion of these provisions.

JACOB, *supra* note 22, at 121.

[142] *Honolulu Advertiser* reporter Pat Hunter wrote a four-part series on various aspects of divorce. The series ran in the Advertiser from April 7, 1975, through April 10, 1975. *See* Pat Hunter, *No-Fault Divorce - It Still Isn't Easy*, HONOLULU ADVERTISER, Apr. 7, 1975, at B1; Pat Hunter, *Financial Results in Divorce Can Be a Disaster*, HONOLULU ADVERTISER, Apr. 8, 1975, at B1; Pat Hunter, *What Happens When Custody is an Issue*, HONOLULU ADVERTISER, Apr. 9, 1975, at E1; Pat Hunter, *The Poor Who Can't Afford Divorce Costs*, HONOLULU ADVERTISER, Apr. 10, 1975, at B1.

one of the state's most notable family law attorneys.[143] In discussing the economic consequences of divorces, Rice said:

> Although there's no statute at the present time that says you have to treat divorce the same way you would the dissolution of a partnership, the trend is to consider the marital partnership equal and try to divide the assets equally . . . [e]ach [spouse] has contributed to the accumulation and preservation of those assets . . . .[144]

At the time of Rice's statement, the UMDA was already available for consideration and adoption by all states. His statement that Hawai'i had not yet statutorily adopted the partnership model could be construed to reflect an awareness of the UMDA's presence in the wings. Not only did Hawai'i's statutes say nothing about marital partnerships, but its appellate courts would say nothing about such partnerships for at least another decade.[145] Thus, Rice's reference to a "trend" must have sprung not from local sources but from an awareness of broader conversations such as those that occurred during the heated UMDA debates.[146]

The UMDA acted as a prism, first capturing the social and economic shifts within individual relationships and the larger society, then translating those changes into proposed legal reform. It was reflective and responsive, seeking to conform the law to current realities rather than to blaze new trails. It gave a formal place and process for reform, and by its national character and repute, institutionalized the debates and the vocabulary on the changing face of divorce and its incidents. It gave a message on where things could or should be, and left it to the states to decide whether or when to climb on.

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[143] On September 13, 1996, Thomas Rice died at the age of seventy-six. In a one-page bulletin sent to section members in September 1996, Hawai'i State Bar Family Law Section Chair Geoffrey Hamilton noted that Rice had been regarded by many as the "father" of modern Hawai'i divorce practice. Hamilton also reminded members that Rice had been the section's first chairperson.

[144] Pat Hunter, *Financial Results in Divorce Can be a Disaster*, HONOLULU STAR BULLETIN, Apr. 8, 1975, at B1.

[145] *See infra* notes 264-79 and accompanying text.

[146] Rice also alluded to the importance of non-economic contributions spouses made to partnerships that entitled them to share in the profits of the partnership. *See* Hunter, *supra* note 144, at B1. While acknowledging that the evaluation of those contributions was not easy, it was clear that he thought it appropriate to consider them. In a statement that mixed enlightenment with the continued realities of gender positions in the sixties, he said the following: "Men generally fail to realize they didn't get where they are today all by themselves. There's no way to measure how much of a man's success is due to his wife's satisfaction in him and his subsequent feeling of confidence." *Id.*

F. Statutory Changes in 1978

The momentum of divorce reform reflected in, and perhaps, generated by the UMDA, and the passage of the state's no-fault divorce law in 1972,[147] represented clear changes in the way we were willing to look at gender and marriage. In 1978, these changes were further embodied in legislative amendments that remain largely intact to this day. These amendments, which were introduced in House Bill 2095-78, sought to "amend the law relative to the duty of parties to marriage to support themselves, each other and their family."[148] The amendments clustered around two distinct periods: one cluster targeted Hawai'i Revised Statutes sections 573-6 and 573-7 (now renumerated as Hawai'i Revised Statutes sections 572-23 and 572-24, respectively) which dealt with the support obligations of spouses *during marriage;* the remaining cluster was directed to Hawai'i Revised Statutes section 580-47 which dealt with property division and spouse support *at the termination of a marriage.*

1. The "mutualization" of intra-marital support

The amendments dealing with support within an ongoing marriage consisted mainly of changing gender adjectives so that what had been a statutory duty for the husband to support his wife was transformed into a duty by both spouses to support each other and their family. This was significant in that it eliminated, by statutory fiat, the traditional notion of husband as the breadwinner and wife as the homemaker, replacing it by the more egalitarian idea of mutual support.[149] The amended statutes were in accord with the

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[147] Passed in 1972 by the sixth state legislature, Act 11 amended portions of Hawai'i Revised Statutes Chapter 580 to eliminate fault as grounds for divorce. 1972 Haw. Sess. Laws 165-67.

[148] S. STAND. COMM. REP. NO. 720-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. S. JOURNAL 1978, Reg. Sess. 1088 (1978).

[149] The "bilateralization" of support obligations within marriage met with some resistance particularly from women who considered themselves homemakers and were concerned that this mutual support statute would allow wayward husbands to duck their obligations with impunity. A sample of the forceful and passionate testimony submitted against the bill is as follows:

> As the mother of seven children I have been very conscious of a movement to downgrade mothering and the family. I am deeply concerned with the impact of this on future generations. I see HB #2095 dealing with spousal liabilities as one step in that degradation process.
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> I am not concerned for its impact on me for I have a responsible husband, but not everyone does, and for those who don't, their only recourse is the law. If they are not protected under the law we have failed them.
>
> . . . .
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> With both parties of a marriage equally liable for the necessities to maintain that marriage, what is to protect the full-time homemaker from a husband who goes out and runs up bills he cannot pay? Is the wife then required to:

concept of a marital partnership to the extent that they set forth both an ideal and an expectation that spouses would take care of each other, and that each brought into the marriage a modicum of resources, financial and non-financial, to be used for the security and advancement of the marital unit.[150] If there was dependency, it was assumed that each partner relied on the other, although perhaps in different ways, and that the fact of dependency did not *per se* suggest inferiority. The law let the spouses decide for themselves the nature and extent of each person's labors and contributions, but assumed that these decisions would ultimately be driven by the best interests of the family. Where the process of intrafamilial decision-making failed to work, and the court was relied upon to intervene, specific factors were set forth to guide the court.[151]

2. *Support obligations after the breakup*

The other cluster of amendments proposed in House Bill 2095 dealt with support obligations in separation and divorce.[152] These amendments modified

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1) leave her children with a sitter and go out and earn money to pay off those debts or, 2) sell other goods she may have to pay off the debts or, 3) serve beside her husband in a prison term incurred through non-payment?

I would say House Bill #2095 does not meet the needs of the full-time homemaker and has the potential to do her great harm. I believe it requires greater study to find a law that will satisfy all parties equally . . . for I believe being treated the same is not necessarily just in all cases.

Marilyn White, Testimony against House Bill No. 2095-78 heard by the House Judiciary Committee (Feb. 8, 1978).

The amendments were driven in part by Hawai'i's ratification of the Equal Rights Amendment in 1972 which is now found under Article One, section 3 of the Hawai'i State Constitution. *See* Sherry Broder & Beverly Wee, *Hawaii's Equal Rights Amendment: Its Impact on Athletic Opportunities and Competition for Women*, 2 U. HAW. L. REV. 97, 100-01 (1979). Stating simply that the "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex[,]" the statutory amendments under House Bill No. 2095-78 were cited by the House Judiciary Committee as necessary for avoiding the constitutional deficiency of imposing support obligations on the male spouse only. *See* H. R. STAND. COMM. REP. NO. 309-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1526-27 (1978).

[150] The original draft of House Bill No. 2095-78 set forth factors to be considered when determining support obligations during separation and divorce, but did not extend the factors to the determination of obligations in an ongoing marriage. And thus the bill was amended to resolve this concern. *See* H. R. STAND. COMM. REP. NO. 309-78, 9th State Legis., Reg. Sess. (1978) *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1526-27 (1978).

[151] *See infra* note 154 and accompanying text. These factors are now found in Hawai'i Revised Statutes section 580-47(a), the section that deals with the division of property and alimony incident to a divorce. The House Judiciary Committee amended the bill to apply this list to ongoing marriages. *See* H. R. STAND. COMM. REPORT NO. 309-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1527 (1978).

[152] The "mutualization" of post-separation or divorce support obligations was already

Hawai'i Revised Statutes section 580-47 to include a non-exhaustive list of specific factors for the family court to consider when deciding support obligations.[153] Among these factors were the financial resources of the parties, each party's ability to independently meet his or her needs, the duration of marriage, the standard of living during the marriage, the age of the parties, the physical and emotional conditions of the parties, each party's needs, and the probable duration of the need of the party seeking support.[154]

Although this set of amendments focused on support and maintenance provisions of divorce and not ostensibly upon property division, legislative committee reports indicate that legislators fully intended to apply these factors to property division as well. For example, the House Judiciary Committee wrote, "[t]he bill also amends laws relating to divorce and separation by listing factors which are to be considered by the court in determining the *disposition of property* and support and maintenance obligations."[155] Likewise, the Senate Judiciary Committee which developed the draft that ultimately became the current law wrote:

> Your Committee notes that when the Legislature adopted no-fault divorce in Hawai'i, one of the primary purposes was to avoid unnecessary disputes between the parties. However, because of the vagueness of the present law, many divorces continue to be marred by disputes over *division of marital assets* and support and maintenance obligations. *Your Committee therefore amended the bill by listing factors which clearly define the rights and obligations of the parties in regard to division of marital assets* and maintenance obligation. These factors add certainty to the law and minimize avoidable disputes between the parties.[156]

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legislatively enacted in 1967 under Act 76, eleven years before support obligations in ongoing marriages turned gender neutral. *See* 1967 Haw. Sess. Laws 76-77. This act amended Revised Laws of Hawai'i section 324-37 (now Hawai'i Revised Statutes section 580-47) to read in relevant part:

> Upon granting a divorce, the court may make such further orders as shall appear just and equitable . . . compelling either party to provide for the support and maintenance of the other party and finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate. In making such further orders, the court shall take into consideration the respective merits of the parties, the relative abilities of the parties [as opposed to just the husband's], the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the marriage, and all circumstances of the case . . . .

1967 Haw. Sess. Laws 76.

[153] These factors were enacted in 1978 under Act 77. *See* 1978 Haw. Sess. Laws 100-02.

[154] *See* HAW. REV. STAT. ANN. § 580-47(a) (Michie 1997). *See infra* note 156, for the complete listing.

[155] H. R. STAND. COMM. REP. NO. 309-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. H. R. JOURNAL, Reg. Sess. 1526-27 (1978)(emphasis added).

[156] S. STAND. COMM. REP. NO. 720-78, 9th State Legis., Reg. Sess. (1978), *reprinted in* HAW. S. JOURNAL, Reg. Sess. 1088 (1978)(emphasis added).

The list of thirteen factors assembled by the Senate Judiciary Committee clearly bore the influence of the UMDA, matching almost item by item, the list appearing in the UMDA's section 308.[157] Although the legislative history evinced a consistent and firm intent to apply these factors to property division as well as to alimony, the statutory language inexplicably failed to reflect this.

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[157] UMDA section 308 reads in relevant part:

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including martial property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
(3) the standard of living established during the marriage;
(4) the duration of the marriage;
(5) the age and the physical and emotional condition of the spouse seeking maintenance; and
(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 348 (1987).

In comparison, House Bill No. 2095-78, H.D.1, S.D.1, which is now codified as Hawai'i Revised Statutes section 580-47, reads in relevant part:

In addition to any other relevant factors considered, the court, in ordering spousal support and maintenance, shall consider the following factors:

(1) Financial resources of the parties;
(2) Ability of the party seeking support and maintenance to meet his and her needs independently;
(3) Duration of the marriage;
(4) Standard of living established during the marriage;
(5) Age of the parties;
(6) Physical and emotional condition of the parties;
(7) Usual occupation of the parties during the marriage;
(8) Vocational skills and employability of the party seeking support and maintenance;
(9) Needs of the parties;
(10) Custodial and child support responsibilities;
(11) Ability of the party from whom support is sought and maintenance to meet his or her own needs while meeting the needs of the party seeking support and maintenance;
(12) Other factors which measure the financial condition in which the parties will be left as the result of the action under which the determination of maintenance is made; and
(13) Probable duration of the need of the party seeking support and maintenance.

HAW. REV. STAT. ANN. § 580-47(a) (Michie 1997).

As adopted, the plain language of the changes to Hawai'i Revised Statutes section 580-47 instructed the family court to consider these factors in ordering support and maintenance only, leaving property division to the flexible but vague "equitable distribution" standard.[158]

Nonetheless the factors for support and maintenance reflected the changing attitudes toward alimony, and correspondingly, property division. They were gender neutral, thereby reinforcing the fact that the need for, as well as the ability to provide support could run both ways. They affirmed that alimony would in most cases be temporary rather than the lifetime post-divorce annuity it had once been.[159] They provided bench marks for determining the need for support, weighing heavily the potential, ability and opportunities for an individual to obtain income independent of the former spouse. The conspicuous absence of fault or marital misconduct from the list followed the elimination of fault-based divorces six years earlier.[160]

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[158] Because of the flexibility of the "equitable distribution" standard, courts could conceivably use the listed factors in disposing of the property distribution scheme. As seen later, however, the case law which developed through the 1980's to the present, created a framework which its critics argued diverted analysis to the particulars of the framework and away from a fuller possible range of relevant factors. *See, e.g., infra* notes 264-79 and accompanying text.

[159] The UMDA's alimony provision, section 308, set forth a two-tiered process for determining support.

The first tier was to be used to see if support was even appropriate. Specifically, this first step stated that a court could only grant support if the petitioning spouse "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home." UNIF. MARRIAGE AND DIVORCE ACT 9A U.L.A. 348 (1987).

The second tier, consisting of many of the factors adopted in House Bill No. 2095-78, was to be used to determine the amount and periods of time of an award only if the spouse seeking support satisfied the first level of inquiry.

While Hawai'i did not adopt the two-tiered system, it was clear that the days of requiring a husband to provide long-term support was over. The multifactorial analysis that was adopted provided a screen against both the frequency and longevity of awards.

In fact, by the time the 1978 amendments were adopted, the number of alimony awards granted in Hawai'i were already on the wane. Eight years before, the *Honolulu Star Bulletin* reported that "(v)ery few women receive alimony nowadays according to officials of Hawaii's Family Court. The trend in the past ten or fifteen years, not only in Hawai'i but in most other states as well, has been to award child support only." *Few Divorcees Get Alimony*, HONOLULU STAR BULLETIN, July 30, 1970, at D-3.

[160] Actually, Hawai'i Revised Statutes section 580-47 contained no expressed prohibition against the use of fault as a factor. However, the effect of this omission was later clarified when the Hawai'i Supreme Court declared that fault would be a non-factor in both alimony and property division. *See, e.g.*, Richards v. Richards, 44 Haw. 491, 355 P.2d 188 (1960); Woodworth v. Woodworth, 7 Haw. App. 11, 740 P.2d 36 (1987).

Even without explicitly attributing this list of factors to property division, the statute already contained language which gave some direction to courts. Such considerations as "the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, [and] the burdens imposed upon each party for the benefit of the children of the parties" remained available to the court.[161] Although vagueness made their application somewhat difficult,[162] these considerations reflected the same attention to gender-neutral needs, abilities and circumstances that was emerging across the country. The ideals of egalitarianism and sharing (not only of property but also of the disruption caused by divorce) were evident in these factors and helped to lay the foundation for acceptance of the marital partnership model.

As indicated above, Hawai'i apparently drew from the UMDA in amending Hawai'i Revised Statutes section 580-47. Like the UMDA, the amendments, to a large extent, did no more than reduce a twirl of existing realities into a code of legal rules. It would be the last significant amendment to Hawai'i Revised Statutes section 580-47 related to property division and alimony. From there, the courts took over.

G. The Court Acts

Some look to the 1986 Hawai'i Supreme Court decision in *Cassiday v. Cassiday*[163] as the first enunciated step toward the eventual adoption of the partnership model in Hawai'i. While *Cassiday* marked a clear turning point, it was preceded by a string of Intermediate Court of Appeals decisions authored by Chief Judge James Burns in the 1980's which outlined the model and began casting it as the norm.[164] Although none of these ICA decisions used the term "partnership," their concepts unmistakably bore its markings.

To a degree, the ICA decisions, with their thoughtful detail, were logical extensions of previous appellate decisions. It is therefore helpful to look a few years back to when divorce reform began to hit the nation, to get an idea of where Hawai'i appellate decisions were moving and the foundation they laid for later decisions.

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[161] 1978 Haw. Sess. Laws 101; *see also supra* note 116.

[162] As seen later in this article, the reported difficulties in applying and measuring such vague and generalized factors led to the development of a framework which was intended to lend certainty and predictability to property division decisions.

[163] 68 Haw. 383, 716 P.2d 1133 (1986).

[164] *See* discussion *infra* Part II.G.2.

1. The pre-Burns period: Richards, Carson and Au-Hoy

As mentioned above and in the next section, development of the partnership model of property division began to accelerate after Chief Judge Burns joined the ICA and almost single-handedly created much of the body of modern appellate decisions dealing with family law in Hawai'i. Before the creation of the ICA, however, the Hawai'i Supreme Court issued several opinions that laid stepping stones on the path leading to the ultimate development and adoption of the partnership model. In this section, we will look at three cases, *Richards v. Richards*,[165] *Carson v. Carson*,[166] and *Au-Hoy v. Au-Hoy*.[167]

a. Richards v. Richards

In 1960, the Hawai'i Supreme Court, then the only appellate court in the state,[168] decided *Richards v. Richards*.[169] The *Richards* opinion was the supreme court's first significant attempt to construe the "equitable distribution" statute enacted in 1955, which apart from the short-lived community property statute, finally authorized courts to divide and distribute property. The tone of the opinion was decidedly modern when stood against the *Bulgo v. Bulgo*[170] decision three years before.

The case had begun in 1955, when Helen Richards filed a divorce complaint alleging grievous mental suffering as the grounds for the divorce.[171] Having reserved the issues of alimony and property division for later consideration, the trial court granted the divorce.[172] Over a course of seven months, the trial court took evidence and heard arguments on alimony and property division.[173]

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[165] 44 Haw. 491, 355 P. 2d 188 (1960).

[166] 50 Haw. 182, 436 P.2d 7 (1967).

[167] 60 Haw. 354, 590 P.2d 80 (1979).

[168] The Hawai'i Intermediate Court of Appeals, which has become the primary source of family law appellate opinions, was created only after the 1978 Constitutional Convention which adopted the needed constitutional provision for an intermediate appeals court. For an interesting account of its creation and role, see Jon C. Yoshimura, *Administering Justice or Just Administration: The Hawai'i Supreme Court and the Intermediate Court of Appeals*, 14 U. HAW. L. REV. 271 (1992).

[169] 44 Haw. 491, 355 P. 2d 188.

[170] 41 Haw. 578 (1956); *see also supra* note 122.

[171] *See Richards*, 44 Haw. at 492, 355 P.2d at 190.

[172] *See id.* at 493, 355 P.2d at 191.

[173] *See id.* At the time of the trial, the statute dealing with support payments and property division read, in relevant part, as follows:

> Upon granting a divorce the judge may make such further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage, *to provide such suitable allowance for the wife, for her support, and to finally divide and distribute the estate, real, personal or mixed, whether community, joint, or separate, in*

While granting a permanent alimony award of $600 per month to Mrs. Richards, the court denied her request for property beyond household furniture, silver, art work and other items considered under the rubric of "household paraphernalia."[174] Mrs. Richards challenged the adequacy of the permanent alimony award as well as the property division.[175]

The significant item of property at issue was Mr. Richards' shares of stock in Kahua Ranch, Limited.[176] He acquired about 3/4 of his shares prior to marriage and purchased the final 1/4 during the marriage.[177] Estimates of the total value ranged from $160,500 to $573,000, the former being the husband's estimate, the latter being the wife's.[178] The trial court awarded all shares to the husband.[179]

Mrs. Richards argued that she was entitled to a portion of the stock because she contributed to its acquisition and maintenance "to the extent that she used her [own] funds to pay the living expenses which libelee [Mr. Richards] was

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such proportion as shall appear just and equitable, having regard to the respective merits of the parties, to the ability of the husband, to the condition in which they will be left by such divorce, to the burdens imposed upon it for the benefit of the children of such marriage, and all other circumstances of the case.

Id. at 501, 355 P.2d at 195 (emphasis added).

Note again that the obligation of support at the time fell on the defendant, which by the plain language of the statute, was assumed to be the husband.

[174] *See id.*

[175] *See id.* at 494, P.2d at 191. Interestingly, Mrs. Richards also argued that the divorce should not have been granted prior to the adjudication of support and property issues. *See id.* Her argument suggested a continued reliance on the male spouse, not surprising given the norms of the time (pre-1960). Her concern was understandable: had Mr. Richards died after the divorce but before an award of property and support could be made, Mrs. Richards would have been without the financial resources available through a dower incident to the marriage, or through a property award incident to the divorce.

The parties had been married for seventeen years when the divorce was filed in 1955. *See id.* at 516, 355 P.2d at 202. This was apparently not the first marriage for either spouse. *See id.* at 513, 515, 355 P.2d at 200-01. At the time of the marriage, Mr. Richards was president of the Hawaiian Pineapple Company, Ltd., earning an annual income of $125,000 and owning assets with a net worth of $941,000. *See id.* at 516, 355 P.2d at 202. During the marriage, however, he lost his position, experienced a significant drop in income, and incurred business debts of over $640,000. *See id.* Nonetheless, the parties continued to maintain an expensive lifestyle to the time of the divorce, with expenses exceeding income. *See id.*

[176] *See id.* at 511, 355 P.2d at 199.

[177] *See id.* at 512, 355 P.2d at 200.

[178] *See id.*

[179] Mr. Richards was also allowed to keep his residence worth $43,500 (there was no net worth at the time of the divorce due to encumbrances equal to the property's value), other corporate stock worth $99,423 and was awarded $15,000 worth of household paraphernalia. *See id.* at 493, 510-11, 355 P.2d at 191, 199-200.

bound to provide."[180] The court was unpersuaded, finding that the husband was not solely responsible for paying living expenses incurred during the marriage.[181] Further, the court determined that Mr. Richard's net worth had been significantly eroded by the lavish lifestyle enjoyed by the parties despite Mr. Richard's declining income.[182] Thus, far from helping to preserve her husband's estate, she helped to consume it.[183] The court also took note of Mrs. Richards' own property and its considerable "during marriage" appreciation.[184]

In considering the permanent alimony issue and whether the $600 per month award was adequate,[185] the court looked primarily at each spouse's individual income and necessary expenses, and concluded that the award, while "on the low side," was insufficient to evince judicial abuse of discretion (the appropriate standard of review).[186] The court sought a "realistic appraisal of the situation of the parties at the time of the divorce" which included "a consideration of the respective resources and revenues of the parties, their accustomed manner of living, and the manner of living which is appropriate on the basis of such resources and revenues," with the primary consideration generally being the respective income of the parties.[187] The court was willing to give less weight to actual income as a measure of need when the income was being depressed because of malingering or that assets were being kept in

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[180] *See id.* at 513, 355 P.2d at 200. In addition, Mrs. Richards argued that Mr. Richard's misconduct, which led to the divorce, entitled her to an amount of property equal to the dower she would have received had the marriage remained intact. *See id.* at 502, 355 P.2d at 195. This argument was rejected because the court determined that personal misconduct was not an appropriate factor in the division of property. *See id.* at 509, 355 P.2d at 198. Thus, the elimination of fault as a basis for property division disappeared before the elimination of fault-based divorce in 1972.

[181] *See id.* at 513-14, 355 P.2d at 200-01.

[182] *See id.* at 514, 355 P.2d at 201.

[183] *See id.*

[184] At the time of marriage, Mrs. Richards' property consisted of $25,205 in bank deposits, a claim of $12,436 against a former husband's insurance adjustments, household paraphernalia valued at $25,587 and jewelry of an unspecified value. *See id.* at 513, 355 P.2d at 200. At divorce, she had bank deposits, traveler's checks, U.S. treasury bonds and current credits amounting of $42,045. *See id.* In addition, she held securities valued at $4,827 and jewelry worth $52,925. *See id.* The household paraphernalia awarded to her by the trial court totaled $35,000 in value. *See id.* The at-marriage total was thus at least $63,000; the at-divorce total was approximately $135,000. *See id.*

[185] Mrs. Richards was seeking an award of $1,813 to supplement her own income of $2,400/month. *See id.* at 502, 355 P.2d at 195. She argued that a total monthly income of over $4,000 was needed to maintain the lifestyle to which she had become accustomed. *See id.* at 502, 514, 355 P.2d at 195, 201.

[186] *See id.* at 515-16, 355 P.2d at 201-02.

[187] *See id.* at 516, 355 P.2d at 202.

a non-productive form.[188] The court was also willing to factor in such circumstances as the ill-health of a party ostensibly as a measure of need or inability to earn income.[189]

The court rebuffed as overly broad the general proposition that a wife, who was divorced because of her husband's misconduct, was entitled to live in the same manner to which she was accustomed during the marriage and that the husband was obligated to fund that lifestyle by way of an alimony award.[190] While the court appeared to think that the proposition could be true in some instances, it was clearly departing from a punitive fault-based formula well over a decade before no-fault divorces became a statutory reality.

The *Richards* opinion showed that its authors were ready and able to use at least some of the pieces of the partnership model. Certainly, the court was willing to ignore statutory language that still emphasized a husband's ability and responsibility to amass resources and provide support.[191] It assumed the possibility that both spouses could earn and obtain wealth, provide support, and experience need. This was essential to the understanding of an equal partnership.

Further, the court was willing to look at spousal contributions, and the compensation thereof, as a basis for property division and distribution.[192] But while the concept of contributions would have a place in the marital partnership model, it would often require neither an appraisal of each contribution nor a dollar-for-dollar repayment. Instead it would exist as an assumption, or perhaps, an expectation. That partners expended energy and other resources in myriad and sometimes mundane ways, in the interest of advancing the partnership, would generally be deemed sufficient to justify a fair, if not equal, sharing of partnership property when that partnership dissolved. In *Richards*, the court only considered financial contributions that were more easily measurable. It would take several more years and another case before the value of non-financial contributions would be recognized.[193]

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[188] *See id.* at 516-17, 355 P.2d at 202.

[189] *See id.*

[190] *See id.* at 516, 355 P.2d at 202.

[191] *See id.* at 513-14, 355 P.2d at 200-01 (rejecting Mrs. Richards' assumption that husbands were obligated to fund all of the family's living expenses).

[192] *See id.* at 512-13, 355 P.2d at 200 (reviewing the trial record to identify contributions by the wife to the "building up" of the husband's estate, and finding none to justify a sharing of the husband's estate). Interestingly, the court also noted how, in an earlier decision, it had recognized the contributions of the wife to the growth of the marital estate and how it had found alimony in gross awards to be a way to compensate her during the period when domestic relation courts lacked jurisdiction to divide property incident to divorce. *See id.* at 505, 355 P.2d at 196-97.

[193] A more modern conceptualization of contributions can be found in *Epp v. Epp*, 80 Hawai'i 79, 92-93, 905 P.2d 54, 67-68 (1996) and *Jackson v. Jackson*, 84 Hawai'i 319, 933

b. Carson v. Carson

In 1967, seven years after *Richards*, the supreme court issued its decision in *Carson v. Carson*.[194] Once again, the supreme court faced the question of whether the trial court had correctly declined the wife's request for an award of her husband's separate property, which consisted largely of real property and securities acquired prior to marriage with a worth of $250,000 at the time of divorce.[195] The trial court refused providing no explanation other than to note that the husband's property was obtained before the marriage and that the marriage was "fairly short" (eight years).[196] However, the court granted Mrs. Carson a monthly award of $400 over a period of three years "to get her adjusted," noting that it had already "strain[ed] the evidence in order to grant her an absolute divorce."[197]

P.2d 1353, 1367 (1997).

In more recent developments of property distribution law as described later in this article, the courts began to generally categorize property as marital versus non-marital property, finding the distinction helpful in thinking about how property should be divided. *See infra* Part III.

In *Richards*, the court either broadly defined "non-marital" property or simply adhered to a form of title-based distribution. Allowing the husband to retain the entire value of his Kahua Ranch stock, a full one-fourth of which was acquired *during* the marriage, suggests this. *See Richards*, 44 Haw. at 511-12, 355 P.2d at 200. As valued by the husband, the stock was worth $160,000 (wife argued that the value was closer to $600,000). This alone exceeded wife's total award of about $135,000, much of which represented a return of the property she apparently owned premaritally or acquired during the marriage. *See id.* at 512-13, 355 P.2d at 200. Although the statute subjected all types of property to division and distribution regardless of whether they were community, joint or separate, the *Richards* opinion suggested both an inclination to return property to the spouse who brought it into the marriage, and an understanding that such a return would be fair. The supreme court's tone changed seven years later when it decided *Carson v. Carson*. *See infra* notes 194 and 199 and accompanying text.

Richards also provided an early look at how the court thought about distributing the "during marriage" appreciation of property acquired premaritally. In the case of the Kahua Ranch stock, the court appeared predisposed to let such growth in value remain with the owner spouse unless the other spouse could sufficiently justify a claim to it. *See id.* at 511-13, 355 P.2d at 199-200. In later years, as the partnership model began to emerge, appellate decisions tended to favor awarding a part of the during-marriage appreciation to the non-owner spouse. *See, e.g., infra* note 257 and accompanying text (the ICA first states a "general rule" guiding trial judges toward the sharing of during marriage appreciation of separate properties).

[194] 50 Haw. 182, 436 P.2d 7 (1967).

[195] *See id.* at 183-86, 436 P.2d at 9-10. The husband-respondent in this case was Robert Carson who was chief administrative assistant to then-United States Senator Hiram Fong. The job paid Carson $20,000 per year which, when added to income from other sources, gave Carson a per annum income of $30,000. *See High Court Reverses Divorce Case Ruling*, HONOLULU STAR BULLETIN, Dec. 13, 1967, at A-9.

[196] *See Carson*, 50 Haw. at 187, 436 P.2d at 9, 11.

[197] *See id.* at 183, 436 P.2d at 9. The court also remarked that it "certainly [had] not fe[lt] sorry for Mrs. Carson" but expressedly denied that this impacted its decision to withhold

The supreme court found the trial judge's reasoning to be an abuse of discretion.[198] Concluding that the trial judge had placed undue weight on the "separateness" of the husband's property, the court reversed the decision and instructed the trial judge on remand to consider other factors listed in Revised Laws of Hawai'i section 324-37, including the "respective merits of the parties," the "ability of the husband," "the condition in which parties would be left by the divorce," and "all other circumstances of the case."[199]

The supreme court took the opportunity to run down the statutory list of factors. The court began with the "respective merits of the parties" which it interpreted to include "the consideration of a spouse's contribution to, or assistance in the accumulation or preservation of, the separate property of the other."[200] As it did in *Richards*, the court looked for evidence that Mrs. Carson had somehow contributed. Unlike *Richards*, however, it found it in the form of such activities as the sewing of her own dresses, the purchasing and refinishing of second hand furniture, and fulfilling the social role of aiding her husband in his employment.[201] The court also noted that she worked without compensation at a "family business" distributing cosmetics, drugs and jewelry.[202] It concluded that by helping to maintain the level of marital property, the wife facilitated the preservation of the husband's separate property which would otherwise have been used to pay for marital

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property from her. *Id.*

[198] *See id.* at 187, 436 P.2d at 11.

[199] *See id.* at 184, 436 P.2d at 9. Whether the trial judge had actually failed to consider factors other than the premarital acquisition of property or had considered them but simply failed to say so is open to conjecture. According to the trial judge, the fact that the acquisition occurred prior to marriage was not by itself dispositive. *See id.* However, the judge failed to elaborate other than to say that the facts of the case did not justify an award to the wife. *See id.* Neglecting to say what those "facts" were or how they were weighed could well have been the extent of the court's culpability.

The trial judge, Allen Hawkins, did consider the length of the marriage. *See id.* at 187, 436 P.2d at 11. The parties were married for approximately eight years. *See id.* Judge Hawkins considered the marriage to be a "fairly short" one and used this finding to support his decision to withhold the husband's separate property from the wife at the time of divorce. *See id.* at 183, 436 P.2d at 9. In reviewing this portion of the decision, the supreme court measured the length of the marriage in terms of how many years were "happy" ones. *See id.* at 187, 436 P.2d at 11. Finding that the marriage had been relatively good for 6 1/2 years, the court determined the period to be long enough to entitle wife to some share of the husband's separate property. *See id.* The idea of looking at the "good" years of the marriage was an early incarnation of a concept labeled "DOFSICOD" (date of final separation in contemplation of divorce), developed later by the state's appellate court. It looked at when the marriage was, in fact, a marital unit in which spouses were assumed to share both resources and burdens. *See* Woodworth v. Woodworth, 7 Haw. App. 11, 15, 740 P.2d 36, 39-40 (1987).

[200] *See Carson*, 50 Haw. at 185, 436 P.2d at 10.

[201] *See id.*

[202] *See id.*

expenses.[203] The court did not require Mrs. Carson to show that she brought property or money to the marriage as a precondition for sharing in her husband's separate property.[204] However, had she dissipated her husband's assets, the court would have considered it a relevant factor.[205]

While still bent toward economic contribution and dissipation, the *Carson* analysis considered acts that, at best, may have had minimal impact on the accrual or maintenance of economic benefits, and whose intended purpose was not necessarily financial enhancement. For example, sewing or refinishing furniture could well have been personal hobbies that had an incidental financial benefit, while attending Washington, D.C. soirees were more likely to be social obligations or opportunities that had little if any financial implications. Although still couched in more tangible economic terms, the *Carson* analysis was actually moving toward an understanding of contributions that were in fact non-financial, but in congregate, served an essential function in the development and support of the marital unit. That Mrs. Carson's contributory acts may have in fact had little measurable financial effect, but remained noteworthy, suggested a shift away from an emphasis on what financial resources one brought to or acquired for the marriage. It was an understanding that was to become essential to the acceptance of the partnership model.

The remainder of the *Carson* analysis was largely aimed at measuring Mrs. Carson's post-divorce needs. Guided by the language of the statute, the court applied factors to its property division analysis that had traditionally appeared in discussions relating to alimony. Looking at such factors as Mrs. Carson's age, limited employment opportunities, minimal separate property, and various medical problems, the court evidenced its belief that property division was not a mere unscrambling and distribution of property that necessarily dictated a return of property to the owner spouse.[206]

The supreme court was clear that property division would be used as a source for meeting the demonstrated needs of a spouse, needs that, especially in longer unions, sprung from the circumstances of the marriage.[207] This would justify reaching not only more deeply into the marital property but also into the less needy spouse's separate property.[208] This does not necessarily square with a strict vision of partnership, or at least not a commercial one. To the extent that partnerships seek a return of the original investment value to each partner and an equal division of the partnership property, there is little

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[203] *See id.*

[204] *See id.* at 185-86, 436 P.2d at 10.

[205] *See id.* at 186, 436 P.2d at 10.

[206] *See id.* at 186-87, 436 P.2d at 10-11.

[207] *See id.*

[208] *See id.* at 184, 186, 436 P.2d at 9-10.

room for consideration of need.[209] Traditional partnership analysis tends to seek historical landmarks within the marriage, thereby explaining its preference for identifying past contributions over future needs.[210] Nonetheless, the then-controlling statute, Revised Laws of Hawai'i section 324-37, directed courts to inject need into their formulation, and thus the *Carson* court's attention to need-based factors was not surprising.[211]

The *Richards* and *Carson* decisions set the landscape upon which a slew of property-related cases, beginning in 1980 and generated by the then-newly created Intermediate Court of Appeals, were built. On the eve of the ICA explosion, however, came one more Hawai'i Supreme Court decision, *Au-Hoy v. Au-Hoy*.[212]

c. Au-Hoy v. Au-Hoy

The Au-Hoys were married for thirty years and had no children from the marriage.[213] This was the second marriage for at least Mrs. Au-Hoy, whose separate property at the time of divorce consisted of an inherited interest in real property "of substantial value" on the island of Hawai'i.[214] Mr. Au-Hoy's "separate"[215] property included two lots in Pupukea, Oahu.[216] The Au-Hoys

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[209] *See infra* note 258 (Hawai'i's commercial partnership law states that upon dissolution, partners should recover the amount of their initial investment and equally divide the profits and losses generated by the partnership; post-partnership need is nowhere to be found in the Hawai'i commercial partnership law); *see also* Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 896-97 (1988).

[210] *See* Reynolds, *supra* note 209, at 896-97.

[211] The court's focus on need came under its discussion of the condition of the parties after the divorce, one of the factors listed specifically in Revised Laws of Hawai'i section 324-37. *See Carson*, 50 Haw. at 186, 436 P.2d at 10-11. It found that "[a]lthough there are no children of the marriage, the condition in which the parties will be left is to be considered, the needs of the wife being of the most importance." *Id.* at 186, 436 P.2d at 10 (quoting Van Klefans v. Van Klefans, 274 P.2d 708 (Wash. 1929)).

[212] 60 Haw. 354, 590 P.2d 80 (1979).

[213] *See id.* at 355, 590 P.2d at 81.

[214] *See id.*

[215] It is unclear whether the term "separate" as used in this case carried the same meaning generally used today. While Mrs. Au-Hoy's inherited real property might fall within the current definition of "separate" property, which includes premarital property brought into the marriage, as well as gifts or inherited property acquired during the marriage, the other "separate" properties in the case may have been labeled as such by virtue of whose name was on title. In the course of a thirty year marriage, even if the spouses maintained somewhat separate lives, it would be difficult to imagine that the separate properties in this case consisted solely of premarital properties or gifts or inheritances acquired during the marriage.

In fact, the opinion stated that with the possible exception of Mrs. Au-Hoy's inherited real property interest in Kona, the parties owned little if any significant property at the time of the

owned a third Pupukea lot as tenants by the entirety.[217] Each spouse worked, maintained separate bank accounts upon which they drew to meet their separate needs; however, the husband covered food and utility expenses incurred after the couple moved into their Pupukea home in 1964.[218] One joint account existed but it was funded solely by the husband and never used by the wife.[219]

The trial court awarded the two "separately" owned Pupukea lots and a one-half interest[220] in the family home to Mr. Au-Hoy. Mrs. Au-Hoy kept her Kona property and the other one-half interest in the family home.[221] She was also granted the right to occupy the family home but was to assume the mortgage payments, property taxes, and charges and improvement costs.[222] The decision did not describe division of anything other than the real property. The husband filed the appeal, claiming *inter alia* that the trial judge erred in awarding the wife one-half of the lot on which the family home was built.[223]

The supreme court affirmed the decision below with little explanation beyond its finding that the family court had not abused its discretion.[224]

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marriage. *See id.* at 355, 590 P.2d at 81. From this, one could reasonably infer that other than Mrs. Au-Hoy's real property interest, all of the significant properties described in the opinion were acquired during the marriage. Thus, the term "separate" property as used here was intended to allude more to the fact that one spouse held title or acquired it during marriage for one's own use and control rather than to strictly describe property that has traditionally been deemed "non-marital"; i.e., premarital property or property acquired by gift or inheritance during the marriage.

One could argue that the Au-Hoys' clear, consistent and long-standing pattern of separating assets and leading separate lives signaled that this was not a typical partnership and that ordinary understandings of separate and marital property did not necessarily apply. "Separate" in this case could simply have affirmed the parties' agreement that property obtained or accrued during the marriage would be deemed as not belonging to the marital unit. In this sense, there is some kinship to the most recent incarnation of what is "non-marital" property as defined in case law. As seen later in this article, *Hussey v. Hussey*, 77 Hawai'i 202, 881 P.2d 1270 (Haw. Ct. App. 1994), sets forth a category of "marital separate property" which consists of property acquired during the marriage via gift or inheritance that the acquiring spouse clearly designates as belonging outside the marital partnership. *See id.* at 207, 881 P.2d at 1275-76.

[216] *See Au-Hoy*, 60 Haw. at 355, 590 P.2d. at 81.

[217] *See id.* at 356, 590 P.2d at 81.

[218] *See id.* at 355, 590 P.2d at 81.

[219] *See id.*

[220] This was awarded in the form of a tenancy-in-common. *See id.* at 357, 590 P.2d at 82.

[221] *See id.*

[222] *See id.*

[223] *See id.* The trial court also made decisions regarding other properties including two lots in Wahiawa, Oahu which bore the name of Mrs. Au-Hoy's son and daughter-in-law as tenants by the entirety. Mr. Au-Hoy apparently argued that it was he and Mrs. Au-Hoy who actually paid for at least one of the lots which thus entitled him to some return of value. *See id.* at 356, 590 P.2d at 82 n.1.

[224] *See id.* at 358-59, 590 P.2d at 83.

Because the parties had maintained separate bank accounts and largely covered their own expenses during their thirty year marriage, the court appeared swayed that the parties had, by agreement, pursued separate lives, and therefore, were entitled to the properties each accumulated during the marriage for his or her own use, even if the properties were purchased with during-marriage earnings.[225] The court appeared to reach this conclusion despite the fact that: 1) the parties cohabited in a jointly owned home for at least the final decade of the marriage; 2) husband paid for food and utilities during this period; and 3) husband established a joint bank account which wife could access.[226]

Like the *Richards* case, all "during-marriage" appreciation was apparently awarded to the title holder of the principal property.[227] This demonstrated at least some adherence to a title-based model of distribution. It is unclear if the supreme court, like it did in *Carson*, gave attention to need-related factors. The majority was willing to accept the trial court's statement that it had reviewed all relevant factors as required in *Carson* enroute to arriving at a "fair and equitable" distribution.[228] Given the fact that wife had maintained her own employment,[229] covered many of her own expenses during the marriage,[230] and owned a valuable interest in real property in Kona, the trial court apparently considered her needs to be adequately met. That the trial judge required her to assume the mortgage payments and the other ordinary

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[225] *See id.*

[226] *See id.* at 355-56, 590 P.2d at 81.

[227] The trial court awarded to husband the two lots in Pupukea which were held in his name and one-half of the family home in Pupukea. *See id.* at 356-57, 590 P.2d at 82. The wife received the other one-half of the family home, as well as her Kona property, which she acquired premaritally. *See id.* at 355-57, 590 P.2d at 81-82. In its decision, the trial court alluded to specific parcels of property and not to their values. Thus, it could be assumed that the value of a given parcel, including any during-marriage appreciation, was awarded to the spouse who received that parcel.

[228] This rather cursory review drew a dissent from Justice Baird Kidwell who argued that the majority had accepted too easily the trial judge's blanket assurances that he had considered all relevant factors and was aware of the *Carson* decision in developing what he considered a fair and equitable distribution. *See id.* at 359, 590 P.2d at 83 (Kidwell, J., dissenting). Kidwell complained that the trial judge failed to provide a description of what factors were weighed, and therefore thought it impossible to decide if the court below considered the statutory criteria for property division. While acknowledging that trial judges would occasionally stumble upon facts that defied the statutorily required analysis, Kidwell insisted that trial courts had to do more than simply state its awareness of the *Carson* opinion, and must instead, give due consideration to statutory factors. *See id.* at 360-61, 590 P.2d at 84 (Kidwell, J., dissenting).

[229] *See id.* at 355, 590 P.2d at 81.

[230] *See id.*

costs of owning real property[231] was a further acknowledgment of her financial ability.

One might say that the *Au-Hoy* decision accords with the partnership model, although the partnership in this case departed from the norm. The supreme court recognized that this particular partnership developed upon the premise that each partner would carve out his or her own sphere of financial acquisitions and liabilities, essentially excluding these from the community pot and thus, the default principles of partnership distribution. This particular partnership, unlike the ideal marital partnership which emphasizes sharing, was one that allowed each spouse to act autonomously even to the extent of excluding during-marriage acquisitions from the marital estate. The court recognized the parties' expectations of separateness and upheld a distribution that affirmed those expectations.

d. Summarizing the "pre-ICA explosion" period

In summary, on the eve of the "ICA explosion" which ultimately led to the present norm of using partnership to guide property division, Hawai'i's supreme court had already assembled several pieces of the partnership model. The court recognized that each spouse had the potential to become self-supporting through the acquisition of property and income, and could expect equal treatment. Neither spouse was presumed subordinate to or dependent upon the other, although the court, as it had in *Carson*, recognized that one spouse's post-divorce needs could have developed from the marriage itself and therefore be met through a shifting of property from the less needy spouse. Spousal contributions, although primarily financial at this point, arose as a major but not dispositive justification for distributing property. The notion of contribution would lend itself particularly well to the partnership model because it characterized what was expected of spouses and neatly explained why each spouse might be entitled to an equal slice of the marital estate.

Absent evidence of contribution, the court was hesitant to award property that was separately owned by one spouse to the other. This included not only the principal property but any increase in value that accrued during the marriage. If a contribution were made, the court was inclined to consider only those that directly resulted in an acquisition or an increase of value. This meant that tangible, more measurable financial contributions, might result in an award of separate property appreciation whereas household contributions might not unless a nexus to the appreciation could be drawn (as the *Carson* court tenuously tried to do).

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[231] *See id.* at 357, 590 P.2d at 82.

The cases indicated that "separateness" had a broader meaning than that currently used. Its definition seemed drawn in part from the model of title-based property distribution. The court thought it fair to return to the spouse what apparently "belonged" to him, whether it was acquired before or during the marriage. As the *Au-Hoy* decision illustrated, even earnings acquired during a long marriage and the substantial properties purchased with those earnings were not necessarily "marital." As noted above, the opinions reflected little inclination toward assigning during-marriage appreciation of separate property to the marital estate unless a spouse could demonstrate an entitlement through contribution.[232]

While fault-based factors were at least nominally eliminated from consideration, a variety of factors based on title, need and contribution, gave courts much to consider in fashioning an equitable award. Pieces of the partnership model were present, but were mixed with other considerations. As implied in the *Au-Hoy* dissent,[233] identifying and juxtaposing a myriad of relevant factors would be in many cases a difficult task, and in some, almost impossible. Perhaps in recognition of this practical reality, the supreme court in *Au-Hoy* appeared somewhat satisfied with less than the comprehensive and specific multifactorial analysis called for in its *Carson* decision.[234]

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[232] One commentator reviewed how community property states treated during-marriage increases in separate property. *See* Reynolds, *supra* note 30, at 239. She noted that even community property states initially departed from their Spanish civil law roots in developing policies that favored preserving separate property for the owner spouse. *See id.* at 259-60. This was so even when marital assets were used to increase the value of separate property. *See id.* She explained that this originated from the paternalistic notion that a wife's separate estate had to be protected and that any increases in its value could not be taken from her lest it threaten the wholeness of her separate estate and thus her ability to retain it in its entirety. *See id.* at 260.

In addition, because community property states followed the common law practice of letting the husband manage the family's finances, including the wife's estate, courts concluded that if a husband used marital property and labor to increase the value of the wife's separate property, such use was a gift to the wife and thus she was solely entitled to the increase. *See id.* There was no need to compensate the community or to otherwise give an entitlement to the partnership. *See id.*

Later, when trial judges had to decide whether to divide during-marriage increases in the husband's separate property, they merely adopted the "no-division" stance of the earlier "wives" cases even though the underlying policies of the "wives" cases did not apply. *See id.*

When courts in these states began to shift direction and allow the community to partake in increases in a wife's separate property, the rationale centered on the sometimes unjustified assumption that the husband applied all partnership resources to the betterment of the community. It therefore followed that the community developed some entitlement to the increase. *See id.* at 261.

[233] *See Au-Hoy*, 50 Haw. at 359, 590 P.2d at 83 (Kidwell, J., dissenting).

[234] Because the standard of review in these cases is "abuse of discretion", an appellate court has the leeway of upholding a lower court's decision absent abuse. *See id.* at 358, 590 P.2d at 83. The court in *Au-Hoy* was willing to infer that the family court had met its obligation

The cases that followed grappled with this tension between a desire for specificity and comprehensiveness on the one hand, and judicial efficiency on the other. The former tended to stretch the inquiry while the latter tended to structure if not restrict it. This struggle would soon expand to consider the need of practitioners for enough structure and certainty to assess the facts before them, reasonably predict outcomes, and develop negotiating positions.[235] As called for by Justice Kidwell in the *Au-Hoy* dissent, requiring detailed findings from the trial judge that were sufficient to facilitate appellate review would continue to surface as a concern.[236] With Hawai'i Revised Statutes section 580-47 as the base, these all became part of the primal soup from which the partnership model finally emerged.

2. *Judge Burns arrives*

Pursuant to a 1978 amendment to the Hawai'i State Constitution and the statutory provisions enacted to implement the amendment, the Intermediate Court of Appeals was formed.[237] The first three-member panel was sworn in on April 18, 1980 and convened its first session ten days later.[238] One of the original appointees to the ICA was James Burns who had previously served in the state circuit court. During his three years on the circuit court bench, Judge Burns ("Burns") was assigned to the family court.[239]

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pursuant to *Carson* by virtue of the court's summary representation that it was aware of the *Carson* mandate and had performed the required analysis enroute to fashioning its decision. *See id.* That the lower court had not described with much specificity what it actually considered apparently did not faze the reviewing judges. *See id.*

[235] At this writing, the American Law Institute is developing drafts of *Principles of the Law of Family Dissolution: Analysis and Recommendations.* In the preface of its first draft, Professor Marygold Melli of the University of Wisconsin wrote: "When divorce is understood as a process of party negotiation with the possibility of judicial review, one can see that substantive rules are not helpful when cast in terms of judicial discretion exercised . . . 'to achieve an equitable division' or after considering a list of multiple factors. More effective to channel negotiation by parties and their lawyers are rules that use appropriate presumptions and formulas." *Preface to the Tentative First Draft* of A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at xviii (Tentative Draft No. 1, Mar. 15, 1995).

[236] Facilitating appellate review through clear and sufficiently detailed trial court findings was certainly a concern of ICA Chief Judge James Burns who wrote most of the post *Au-Hoy* family law decisions. *See infra* note 283 and accompanying text.

[237] *See* Yoshimura, *supra* note 168, at 276-78.

[238] *See* 1979-1980 ST. OF HAW. JUDICIARY ANN. REP. 14.

[239] Judge Burns ("Burns") was appointed to the state circuit court in May 1977. *See id.* All of the Judiciary's annual reports from FY 1976-1977 through 1978-1979 showed Burns to be one of two circuit court judges assigned to the family court. The other was Judge Betty Vitousek, who was the family court's senior judge during this period. *See* 1976-1977 ST. OF HAW. JUDICIARY ANN. REP. 32, 1977-1978 ST. OF HAW. JUDICIARY ANN. REP. 32, 1978-1979 ST. OF HAW. JUDICIARY ANN. REP. 40.

Frank Padgett, another of the original ICA appointees[240] who later became an associate justice of the Hawai'i Supreme Court, knew of Burns' expertise and interest in family law, and during his long tenure as the supreme court's assignment judge, funneled family law cases to the ICA for Burns' review.[241] This no doubt contributed to the stream of family law decisions authored by Burns during the 1980's to the present. The impact of these decisions on the current state of family law, particularly in property division and distribution, earned Burns such honorifics as "father of modern Hawai'i appellate family law."[242]

a. Promulgating general rules and etching the outlines for the partnership model

Burns started early and fast. His initial decisions demonstrated an awareness that partnership principles might provide a framework for arriving at equitable property distributions. For example, in *Linson v. Linson*,[243] the ICA held that non-vested retirement benefits were subject to division in divorce proceedings.[244] The court recognized that such benefits were more potential than real. However, keeping them out of the equation meant that if they were to vest and mature, the non-employee spouse could not access them even though she had expended "effort" during the marriage to help acquire them.[245] Taking its lead from three community property states that considered non-vested retirement benefits as part of the marital partnership and therefore

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[240] Yoshimi Hayashi was the third appointee. *See* 1979-1980 ST. OF HAW. JUDICIARY ANN. REP. 14. Hayashi was the ICA's original chief judge. *See id.* Like Justice Padgett, he was subsequently appointed to the state's supreme court. *See* 1981-1982 ST. OF HAW. JUDICIARY ANN. REP. 16-17. Burns succeeded him as the ICA's chief judge after his departure in 1982. *See id.* at 18.

[241] Justice Padgett was quoted as follows:

> Judge Burns had been in the family court as a trial court judge and built up a good deal of familiarity with the procedures and had a lot to do with trying to get that court back on track. And I felt that we, again, ought to take advantage of his expertise on the first run through.

See Yoshimura, *supra* note 168, at 294.

[242] William Darrah, Introductory Remarks at the 1995 Family Law Section/Hawaii Institute of Continuing Legal Education Annual Divorce Law Update (Dec. 7, 1995). Darrah, a prominent family law practitioner and leader in state bar activities relating to family law, has chronicled and analyzed many of the Burns-authored decisions in the *Journal of Hawai'i Family Law*, a publication of the Family Law Section for which Darrah has been the editor since its inception in January 1990.

[243] 1 Haw. App. 272, 618 P.2d 748 (1980).

[244] *See id.* at 277, 618 P.2d at 751.

[245] *See id.* at 275, 277-78, 618 P.2d at 750-51.

community property,[246] the ICA found that whether or not non-vested benefits constituted "property;" it simply was inequitable to ignore the fact that "18 of the 20 years necessary to qualify for it were years in which the Linsons were *partners in marriage*."[247] Therefore, the court included it in the divisible marital estate[248] and affirmed the family court's award of 50 percent of Mr. Linson's retirement benefits multiplied by a factor of 18/20.[249]

What Mrs. Linson's contributions were are not at all clear from the opinion. No reference was made to her having worked or owning property of significant worth. There was no mention of children or of any significant homemaker efforts. On the surface, her 50 percent award was solely based on her *status* as an equal partner in the marriage.

In subsequent decisions, Burns began constructing a framework of what he termed "general rules" that formally etched the outlines for the partnership model. He intended these rules to guide property divisions and to give trial judges and practitioners a sense of uniformity, certainty and predictability.[250]

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[246] *See id.* at 275-76, 618 P.2d 750 (citing LeClert v. LeClert, 453 P.2d 755 (N.M. 1969); DeRevere v. DeRevere, 491 P.2d 249 (Wash. Ct. App. 1971); and *In re* Marriage of Brown, 544 P.2d 561 (Cal. 1976)).

[247] *Id.* at 277, 618 P.2d at 751 (emphasis added).

[248] *See id.* at 278, 618 P.2d at 751.

[249] *See id.* at 273, 618 P.2d at 749. The factor of 18/20 consisted of the number of years that Sgt. Linson was in the military while married but prior to separation (eighteen years) divided by the number of years that Linson needed to serve in order for his retirement to vest (twenty years). *See id.*

[250] *See* Hashimoto v. Hashimoto, 6 Haw. App. 424, 725 P.2d 520 (1986). In *Hashimoto*, Burns explained his insistence on setting standards. Although not intended to be "fixed rules" for determining the amount of property to be awarded to each spouse at divorce, these standards provided a starting point from which to perform the equitable distribution analysis required by statute. *See id.* at 426, 725 P.2d at 522. Burns was clearly bothered by the notion that without any guidelines, two cases presenting identical facts could yield widely disparate results depending on who the judge was. *See id.* at 426-27, 725 P.2d at 522-23. Not only did this raise serious questions about the consistency of court decisions but also made it more difficult for attorneys to make reasonable predictions about outcomes, advise clients and propose negotiating positions. *See infra* note 283.

> At a state family law conference, Burns made the following remarks:
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> Many of you know by now that I am a big fan of standardized rules and procedures, uniform principles and manuals. Prior to the 1980's, family court lawyers enjoyed standardized rules and procedures and uniform principles in divorce cases. But that was because one judge in each circuit decided all the cases. And for those of you who are old enough to remember, the line of succession went from Judge Corbett to Judge King to Judge Lum to Judge Vitousek.

Chief Judge James Burns, Introductory Remarks at the 1995 Family Law/Hawai'i Continuing Legal Education Institute (Dec. 7, 1995).

Burns' point was that by knowing the one presiding judge and his or her style, preferences and tendencies, one could reasonably project a range of possible outcomes and plan accordingly.

He stated his first general rule in the 1983 decision of *Raupp v. Raupp*.[251] Writing for the court, Burns determined that it was generally equitable to award each divorcing party the date of marriage net value of his or her premarital property.[252] In addition, the court held that it was generally equitable to award to each party the date of acquisition net value of gifts and inheritances which he or she received during the marriage.[253]

Two months after *Raupp*, in another decision by Burns in *Takara v. Takara*,[254] the ICA declared another general rule: that it was generally equitable to award each divorcing party one-half of the net value of jointly held property.[255] A final general rule came in *Cassiday v. Cassiday*[256] in

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As explained in *Hashimoto*, Burns was also concerned about facilitating appellate review under the abuse of discretion standard. *See Hashimoto*, 6 Haw. App. at 427, 725 P.2d at 523.

[251] 3 Haw. App. 602, 658 P.2d 329 (1983). The Raupps were already in their forties at the time of their marriage in 1970. *See id.* at 603, 658 P.2d at 331. Both owned property premaritally, with Mrs. Raupp owning substantially more, including several parcels of real property. *See id.* at 603-05, 658 P.2d at 331-33. Unlike the marriage in *Au-Hoy*, the union here saw significant mixing of premarital property with marital property (or the transformation of premarital into ostensibly marital property) over the ten-year marriage. *See id.* at 608, 658 P.2d at 334. For example, the parties worked together to form a mobile food concession called "The Chew Chew Caboose" which consisted of a trailer attached to a pick-up truck. *See id.* at 606, 608, 658 P.2d at 333-34. During the marriage, the parties liquidated premarital property to acquire other properties, some of which was used to finance the start-up and maintenance of the "Caboose" and to cover day-to-day living expenses. *See id.* at 608, 658 P.2d at 334.

The ICA also used the opinion to set forth "nuts and bolts" directives on how parties were to identify and organize specific values and items of property to help a trial court sift through the information enroute to fashioning a property award. *See id.* at 609, 658 P.2d at 335.

[252] *See id.* at 610, 658 P.2d at 335.

[253] *See id.* at 611, 658 P.2d at 336.

[254] 4 Haw. App. 68, 660 P.2d 529 (1983). This case involved a two-and-a-half year marriage. The husband in this case inherited three parcels of real property before the marriage. *See id.* During the marriage, husband converted two of these parcels into tenancies by the entirety and the parties purchased a third parcel together. *See id.*

The trial court awarded all parcels to the husband except for a one-half interest in one of the parcels that husband had turned into a tenancy by the entirety. This one-half interest was awarded to the wife. *See id.* at 70, 660 P.2d at 531. The ICA affirmed the lower court decision finding that the relatively short marriage justified deviation from the rule that jointly held properties should, as a general proposition, be divided equally. *See id.* at 71, 660 P.2d. at 532.

[255] *See id.* It is interesting that in *Takara*, pieces of jointly owned property were not in fact equally divided, general rule notwithstanding. There were three jointly-held properties, two of which became joint after husband conveyed them to himself and his wife as tenants by the entirety. *See id.* at 68, 660 P.2d at 530. The third was purchased together. Of these three, the court only divided one equally. *See id.* Various circumstances, including the fact of the gifts from the husband and the relatively short marriage (less than three years), explained the trial judge's decision. The ICA also upheld the trial court's award to husband of a fourth parcel—the marital home acquired during marriage under a tenancy by the entirety. *See id.* at

which Burns wrote the following:

> As a general rule, it is equitable to award each divorcing party one-half of the after acquisition but during marriage real increase in the net value of property separately owned at the TOM [time of marriage] or acquired during the marriage by gift or inheritance and still separately owned at the TOD [time of divorce].[257]

68, 70, 660 P.2d at 530-31. The opinion was oddly silent on why the wife received nothing. This case illustrated Burns' belief that general rules were not in fact fixed and that deviation was expected if circumstances so justified.

[256] 6 Haw. App. 207, 716 P.2d 1145 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986).

[257] *See id.* at 213, 716 P.2d at 1149-50. The court had an earlier opportunity to consider "during marriage" appreciation of premarital separate property in *Takara* but declined to generate a rule. *See Takara*, 4 Haw. App. at 71, 660 P.2d at 532. It also had a chance to look at the issue in *Raupp* but did not do so because appellant/husband had failed to claim any entitlement to such appreciation during the trial. *See Raupp*, 3 Haw. App. at 610, 658 P.2d at 335.

The husband in *Cassiday* was a West Point graduate and retired U.S. Air Force brigadier general. *See Cassiday*, 6 Haw. App. at 208, 716 P.2d at 1147. The wife maintained the home during the thirty-plus years of marriage. *See id.* at 215, 716 P.2d at 1150. Husband acquired several pieces of valuable real property through gifts and inheritance during the marriage. He also owned valuable parcels of land prior to the marriage. *See id.* at 209-11, 716 P.2d at 1147-48. In addition, husband made several during-marriage purchases of real estate, placing some in his name and others in both his and his wife's names. *See id.* For many of his separate properties, husband used "nonmarital" funds to purchase or maintain them. To be "nonmarital", the funds could not have come from income earned during the marriage. *See id.* at 209, 716 P.2d at 1147 n.3.

The trial court essentially awarded all of the separate property to husband and split the jointly held properties equally. *See id.* at 209-11, 716 P.2d at 1147-49. Wife was awarded none of the during-marriage appreciation of husband's separate real property. *See id.* at 212, 716 P.2d at 1149. In addition, wife was awarded $1,150/month in alimony along with $1,150/month from husband's military retirement. *See id.* at 215, 716 P.2d at 1150.

Wife appealed to the ICA arguing primarily that she should have received 50% of the increased value of husband's separate real property to the extent those increases occurred during the marriage. *See id.* at 212, 716 P.2d at 1149. These increases were apparently sizable and an award of 50% would have been substantial. The ICA reversed the property division and remanded the case to the trial court. *See id.* at 216, 716 P.2d at 1151.

Wife also argued that her spousal support award was far less than the $5,000/month allowance she needed to maintain the standard of living to which she had become accustomed during the marriage. *See id.* at 215, 716 P.2d at 1151. Agreeing with the wife, the ICA reversed the spousal support order and set forth a sequence of relevant factors for the trial court to consider. While the factors were enumerated under Hawai'i Revised Statutes section 580-47(a), the ICA used the occasion to list and order what it generally considered most relevant. It directed trial courts to ask themselves the following:

> (1) After taking into account the property awarded in the divorce case, what amount does the spouse seeking support need to maintain the standard of living established in the marriage? If no need can be demonstrated, no support should be ordered.
>
> (2) Considering the income of the party seeking support, or what it should be, and the

This last rule announced in *Cassiday* completed an analytical framework that tracked the principles of commercial partnership law, which provided a template for dividing property based on the partnership model of marriage. In this model, the divorcing partners could generally expect to receive an equal portion of the partnership's profits (i.e., the net value of the marital estate), as well as a return of their respective contributions to the partnership property (i.e., property owned premaritally and brought into the marriage, or property acquired during marriage by one spouse in the form of gifts or inheritances).[258]

During this period, Burns never said that partnership principles were the basis for his general rules. It is clear, however, that he embraced them. In *Linson*, Burns noted that Mrs. Linson had been a "partner[] in marriage" and could thus share equally in her husband's military retirement.[259] Then later, in *Raupp*, Burns sought the point when it became fair to begin deeming the acquisitions of the parties as property of the union.[260] Burns was essentially

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income producing capability of the property awarded to him or her in the divorce action, what is his or her ability to meet needs independently? If the spouse can meet needs independently, no support should be ordered.

(3) Considering the income of the party from whom support is sought, or what it should be, and the income producing capability of the property awarded to him or her, what is his or her ability to meet his or her own needs while meeting the need for spousal support of the other party? *See id.* at 215-16, 716 P.2d at 1151.

Finding that the trial judge in this case had not answered these questions, the ICA remanded the case. *See id.* at 216, 716 P.2d at 1151.

[258] Hawai'i commercial partnership law provides in relevant part as follows:

Rules determining rights and duties of partners

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid the partner's contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to the partner's share in the profits.

HAW. REV. STAT. ANN. § 425-118(a) (Michie 1993). This section was quoted later by the Hawai'i Supreme Court as it moved toward a formal acceptance of the partnership model. *See infra* note 327.

[259] Linson v. Linson, 1 Haw. App. 272, 277, 618 P.2d 748, 751 (1980).

[260] In *Raupp v. Raupp*, 3 Haw. App. 602, 658 P.2d 329 (1983), Burns instructed practitioners to introduce relevant evidence establishing an itemized description and value as of the date of marriage of all property owned by the party at the date of marriage. *See id.* at 609, 658 P.2d at 335. This would assist the court in determining the net value of premarital property as of the date of marriage. Burns recognized that the partnership did not necessarily have to begin with the formal marriage and considered the possibility that an "*economic partnership*" could have existed prior to marriage. *See id.* at 609, 658 P.2d at 335 nn. 7-8. To the extent that it did exist, Burns thought it might be appropriate to obtain values not at the date of marriage but when the *de facto* premarital partnership began. *See id.* This has more recently been labeled

looking for the birth of a partnership.

He began to more explicitly allude to the partnership model after Professor Kastely's 1984 article in which she endorsed the model and recommended how it should apply when dealing with the during-marriage appreciation of property acquired premaritally and of gifts and inheritances received during the marriage.[261] Burns adopted Kastely's position that appreciation of such separate property should be treated as marital property and divided accordingly. He also agreed with her assessment that failing to do so would suggest that marriage was "only a partial commitment" and would not encourage sharing within marriage.[262] Accordingly, in *Cassiday*, Burns instructed the trial court to reconsider its refusal to grant to the homemaker wife 50 percent of the ostensibly substantial "during marriage" appreciation of the husband's separate real property holdings.[263]

However, it was not until the Hawai'i Supreme Court reversed several of Burns' decisions and caused him to reformulate his analysis in subsequent decisions, that the partnership model shot through the surface to become the guiding principle for the division of property. Amid the sometime-heated exchanges between the two appellate courts, the partnership model remained a point of agreement and therefore served as the starting point for each new reformulation. The next section describes this period of conflict, growth and definition.

III. FORGED UNDER FIRE: THE PARTNERSHIP MODEL EMERGES

A. Developing Uniform Starting Points

It was Burns' *Cassiday* decision that suffered the first reversal by the Hawai'i Supreme Court.[264] The reversal came within twelve months of the

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"DOLT" or the "date of living together." Jackson v. Jackson, 84 Hawai'i 319, 324, 933 P.2d 1353, 1358 (Haw. Ct. App. 1997).

Burns later came up with the term "DOFSICOD" or "date of final separation in contemplation of divorce" to signal the *de facto* end of the marriage and therefore the partnership. Woodworth v. Woodworth, 7 Haw. App. 11, 11, 740 P.2d 36, 37 (1987).

[261] *See* Kastely, *supra* note 1, at 391.

[262] Cassiday v. Cassiday, 6 Haw. App. 207, 213, 716 P.2d 1145, 1149-50 n.7 (1985). Burns referred the reader to Kastely's article for the rationale of this new general rule, and thus by reference, could be said to have adopted her concerns for sharing and equalization of ownership.

[263] *See Cassiday*, 6 Haw. App. at 213, 716 P.2d at 1149-50.

[264] Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986).

ICA decision.[265] In a decision by Chief Justice Herman Lum,[266] the supreme court determined that the ICA's general rule which equally split the during marriage appreciation of separate property, "creat[ed] a rebuttable presumption that separate property should be evenly divided" thereby restricting the statutory grant of discretion to family court judges.[267] The court considered it a "fixed rule" that was not authorized by Hawai'i Revised Statutes section 580-47[268] and directed the trial judge to do the multi-factorial analysis required by statute and affirmed in the *Carson* decision.[269]

Although the partnership model was clearly reflected in Burns' general rules, it was in Chief Justice Lum's reversal that marriage was first clearly described as a partnership.[270] Perhaps doing no more than articulating what practitioners and judges were already thinking, the supreme court noted that "marriage [wa]s a partnership to which both partners [brought] their financial resources as well as their individual energies and efforts" and the fact that one partner brought substantially greater assets to the marriage did not make it any less of one.[271] The court then ran through a number of factors. However, this time, the court focused on those that highlighted the contributions of the homemaker spouse.[272]

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[265] The ICA decision was dated May 24, 1985. The reversal from the supreme court came on March 18, 1986, about ten months later.

[266] The opinion was authored by Chief Justice Herman Lum who, like Burns, had been assigned to the family court while sitting on the circuit court bench. Lum served as the family court's senior judge for approximately five years, succeeding Judge Samuel P. King who resigned from the bench to accept an appointment as a federal court judge. *See* 1979-1980 ST. OF HAW. ANN. REP. JUDICIARY 15.

[267] *Cassiday*, 68 Haw. at 388, 716 P.2d at 1137.

[268] In pertinent part, Hawai'i Revised Statutes section 580-47 reads as follows:

> (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear *just and equitable* . . . . (2) compelling either party to provide support and maintenance of the other party; (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint or separate . . . . In making these further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case.

HAW. REV. STAT. ANN. § 580-47(a) (Michie 1997)(emphasis added).

[269] *See Cassiday*, 68 Haw. at 388, 716 P.2d at 1137.

[270] *See id.* at 387, 716 P.2d at 1136.

[271] *See id.* This description of marriage as a partnership was written in the context of describing a common theme among appellate decisions, most of which were authored by Burns. The description itself drew from Professor Kastely's article. *See id.*

[272] *See id.* at 387-88, 716 P.2d at 1137.

The court remanded the case, directing the trial judge to seriously consider how "the marriage *in and of itself* affected the accumulation or preservation of Husband's separate properties."[273] In essence, the court was asking: How much better did Ben Cassiday do because he married Barbara Cassiday? It noted that during the course of a long marriage, Cassiday rose from major to brigadier general, benefitted from his wife's efforts at establishing and maintaining the home, raising the children, and fulfilling the social obligations expected of a high-ranking officer's wife.[274] It further noted that his wife's efforts had some part in ensuring his success in the military, so much so that he never had to liquidate or otherwise use any of his separate property to pay for the needs of the marital unit.[275] Thus, the court instructed the trial court to credit the wife for her contribution to the marriage itself and to factor this credit into deciding how much of the "during marriage" appreciation to award her.[276] However, it refused to uphold the ICA's rebuttable presumption even though it was premised on a notion of partnership that emphasized equality and sharing.[277] While endorsing the partnership model as a "time-honored proposition,"[278] the court seemed willing to consider that marriages were not always equal partnerships, that the contributions of one spouse, while significant, might not warrant an equal division of even marital property.[279]

Cassiday provoked a quick response from the ICA. Six months after *Cassiday*, the ICA issued its decision in *Hashimoto v. Hashimoto*.[280] Burns explained that far from being fixed, his "general rules" were intended to be no more than "uniform starting points" from which to begin the equitable

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[273] *See id.* (emphasis added).

[274] *See id.*

[275] *See id.* at 388, 716 P.2d at 1137.

[276] *See id.* at 388-89, 716 P.2d at 1137-38.

[277] *See id.* at 388, 716 P.2d at 1137.

[278] *Id.* at 387, 716 P.2d at 1136.

[279] *See id.* at 388, 716 P.2d at 1137. The court wrote: "An equal division of the marital estate may be wholly equitable in one circumstance and grossly unfair in another." *See id.* Alternatively, the court was willing to divide property unequally even if the partnership were equal, as long as other factors justified such a division, for example, if one partner squandered assets. *See id.*

Ironically, while the court struck down the "general rule" that "during marriage" appreciation of separate property should be equally divided, it characterized as "generally accepted" another general rule: that each divorcing party was entitled to the date of marriage net value of his or her premarital property and date of acquisition net value of gifts and inheritances which he or she received during the marriage. *See id.* at 390, 716 P.2d at 1138. In addition, it generated what seemed to be a rule of its own: that a trial court could award *up to* one-half of during-marriage appreciation to the non-owner spouse depending on the circumstances of the case. *See id.* at 389, 716 P.2d at 1138.

[280] 6 Haw. App. 424, 725 P.2d 520 (1986).

distribution analysis required by statute.[281] He urged that in order to promote "uniformity, stability, clarity or predictability" in judicial decisions, trial judges should begin their analysis from a series of "uniform starting points."[282] He added that if a departure from these starting points were ordered, trial judges had to describe with adequate specificity the reasons for the departure.[283] To implement this, he assembled a framework.

To begin, Burns created five categories of net market values ("NMVs"). Category 1 consisted of the total NMV of premarital property on the date of the marriage.[284] The during marriage appreciation of such property was labeled Category 2.[285] Category 3 consisted of the NMV of all gifts and inheritances acquired during the marriage while the NMV of the during marriage appreciation thereof was Category 4.[286] Category 5 was the total NMV at the date of divorce minus the NMVs from the other four categories.[287] This final category was an approximation of what would generally be considered the "marital" estate which, all things being equal, would be divided equally.

Having established these categories, Burns proceeded to set forth the following uniform starting points for dividing NMVs in each category:

(1) *Category 1* (premarital property): 100% to the owner spouse;[288]

(2) *Category 2* (appreciation of Category 1): 75% to the owner spouse, 25% to the non-owner spouse;[289]

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[281] *See id.* at 426, 725 P.2d at 522.

[282] *See id.* at 426-27, 725 P.2d at 522-23.

[283] *See id.* at 427, 725 P.2d at 523. Specificity would, in Burns' view, greatly facilitate appellate review by giving reviewing courts the benefit of knowing how the trial court reached its decision and whether the decision breached the abuse of discretion standard of review. *See id.*

[284] *See id.* at 425-26, 725 P.2d at 522. Category 1 was actually defined as "[t]he date-of-marriage net market value of all property separately owned at the date of marriage but excluding the value attributable to property that is subsequently legally gifted by the owner to the other party, to both parties, or to a third party." *Id.*

[285] *See id.* at 426, 725 P.2d at 522. Category 2 was defined as "[t]he during-the-marriage increase in the net market value of category 1 property that the owner separately owns at the time of the divorce." *Id.*

[286] *See id.* Category 3 was defined as "[t]he date-of-acquisition net market value of property separately acquired by gift or inheritance during the marriage but excluding value attributable to property that is subsequently legally gifted by the owner to the other party, to both parties, or to a third party." *Id.* Category 4 was defined as the "during-the-marriage increase in the net market value of category 3 property that the owner separately owns at the time of the divorce." *Id.*

[287] *Id.* Category 5 was actually defined as "[t]he time-of-divorce net market value of all property owned by one or both of the parties at the time of the divorce minus the net market values included in categories 1, 2, 3 and 4." *Id.*

[288] *See id.* at 425-28, 725 P.2d at 522-524.

[289] *See id.* This apportionment arose from Burns' observation that the Hawai'i Supreme Court had allowed the non-owner spouse to have 0% to 50% of the appreciated value of

(3) *Category 3* (gifts and inheritances during marriage): 100% to the owner spouse;[290]

(4) *Category 4* (appreciation of Category 3): 75% to the owner spouse, 25% to the non-owner spouse;[291] and

(5) *Category 5* ("marital" properties): 50% to each spouse.[292]

The framework reached full-bloom in *Woodworth v. Woodworth*[293] in which Burns developed the idea that some marriages, and therefore some marital partnerships, arrived at a *de facto* end prior to its legal dissolution.[294] He called this "the date of final separation in contemplation of divorce," or "DOFSICOD,"[295] and developed a Category 6 which consisted of NMVs specific to this period.[296] He determined that if DOFSICOD occurred before

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Category 1 and 3 NMVs. *See id.* at 428, 725 P.2d at 523. For his uniform starting point, Burns decided to pick the midpoint of this range or 25%. Correspondingly, the owner spouse's share would be 75%. *See id.*

[290] *See id.*

[291] *See id.*

[292] *See id.*

[293] 7 Haw. App. 11, 740 P.2d 36 (1987), *overruled in part by* Myers v. Myers, 70 Haw. 1434, 764 P.2d 1237 (1988).

[294] *See id.* Prior to the *Woodworth* decision, Burns fine-tuned the framework of uniform starting points in *Reese v. Reese*, 7 Haw. App. 163, 747 P.2d 203 (1987), *aff'd in part, vacated in part*, 69 Haw. 497, 748 P.2d 1362 (1988). The portions of the *Reese* decision that were later vacated did not affect the concept of uniform starting points.

Woodworth dealt primarily with land which the parties purchased as tenants in the entirety. *See Woodworth*, 7 Haw. App. at 14, 18-19, 740 P.2d at 39, 41. After the purchase, the parties grew increasingly estranged both emotionally and physically. *See id.* at 14, 740 P.2d at 39. In August 1982, husband discussed divorce with the wife and no attempt at reconciliation occurred thereafter. *See id.* A few months later, husband built a house on the property, spending about $39,000. *See id.* During the divorce proceedings, the trial court awarded half of the aggregate value of the house and lot to the wife. *See id.* at 15, 740 P.2d at 39. Husband then appealed, arguing that the wife deserved none of the value derived from the construction of the house since the house was built well after the date of final separation. *See id.*

[295] *See id.* at 15, 740 P.2d at 39-40. DOFSICOD was defined as the earlier of (1) the date of the completion of the trial or (2) the date when one spouse clearly and unconditionally communicated to the other by word and/or deed that the marriage in fact ended and that a divorce was being sought, and thereafter did nothing to communicate anything to the contrary. *See id.* at 15-16, 740 P.2d at 39-40.

Burns first described this idea of DOFSICOD in a footnote in *Cassiday v. Cassiday*, 6 Haw. App. 207, 209, 716 P.2d 1145, 1147 n.2 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986).

[296] *See id.* at 16, 740 P.2d at 40. An easy way to think of the Category 6 NMV is to consider it to be the difference between all the NMVs as of the end of trial minus the total NMVs as of the date of final separation. Technically, the ICA defined the Category 6 NMV as "[t]he difference between the NMVs, plus or minus, of all property owned by one or both spouses at the conclusion of the evidentiary part of the trial and the total of the NMVs, plus or minus, includable in categories 1, 2, 3, 4, and 5." *Id.*

the conclusion of the evidentiary part of the trial, and the net market values of the properties owned by the spouses at the conclusion of trial changed since DOFSICOD, the difference, plus or minus, should be awarded, as a starting point, to the legal owner spouse in proportion to his or her legal ownership.[297] Essentially, Burns was looking at property as it was acquired or accrued between the final separation of the parties and their divorce, and recognized that although the shell of legal status remained, the innards of the marriage disappeared at DOFSICOD, thereby warranting a departure from the assumptions made of intact marital partnerships.[298]

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[297] *See id.* at 17, 740 P.2d at 41.

[298] *See id.* In an attempt to approximate the *de facto* endpoint of the marital partnership to which the uniform starting points applied, the ICA developed DOFSICOD. The ICA, beginning in *Raupp v. Raupp*, 3 Haw. App 602, 658 P.2d 329 (1983), also considered the point at which the partnership started. *See id.*

In 1989, in *Malek v. Malek*, 7 Haw. App. 377, 768 P.2d 243 (1989), the ICA found that partnerships could begin before the onset of the legal marital relationship, as long as they developed into marriages. *See id.* at 379, 768 P.2d at 246.

In *Malek*, the parties began cohabiting regularly in December 1982 and married in April 1984. *See id.* at 378, 768 P.2d at 245-46. During the period of cohabitation, husband provided all the financial support while wife assisted him in his self-employment. *See id.* at 379, 768 P.2d at 246. In 1986, the parties separated in contemplation of divorce with the proceedings starting a year later. *See id.* at 378, 768 P.2d at 245.

At the time of the divorce, the only property of significance was husband's lease of a two-acre parcel in Maui on which a house was built. *See id.* On the date of the marriage, the net market value of the parcel was $113,000. *See id.* During the two-year marriage, the value increased by $2,000. *See id.* The family court judge awarded 50% of the appreciation and 5% of the date of marriage net market value to wife, totaling $6,150. *See id.* Both awards deviated from the applicable uniform starting points but the ICA found no abuse of discretion in the deviations and affirmed the decision. *See id.* at 382, 768 P.2d at 248.

There is a brief reference to the wife's contribution to the date of marriage net value of the property (i.e., the wife "assisted" husband in his work and in the upgrading of the house). This suggested that the family court judge gave value to the wife's premarital efforts on behalf of the partnership. *See id.* at 378-79, 768 P.2d at 245-46.

The ICA distinguished this case from a typical palimony case by stating that this premarital relation "matured" into a marriage which ultimately ended in divorce. *See id.* at 379, 768 P.2d at 246. Therefore, the Maui leasehold, although acquired premaritally, was considered part of the marriage and subject to the uniform starting point analysis then in existence.

Had the parties not married, the result would likely have been different. Appellate courts in Hawai'i have been slow in recognizing domestic or economic partnerships formed by cohabiting individuals. The Hawai'i Supreme Court has said that: "[M]arriage holds positive and negative legal consequences for each party. A person who is not legally married does not qualify for the positive legal consequences of marriage." Maria v. Freitas, 73 Haw. 275, 832 P.2d 259, 264 (1992)(internal quotations omitted).

Recent legislative enactments that created domestic partnerships entitling unmarried domestic partners to many of the economic benefits previously granted to married persons will necessarily alter this principle. 1997 Haw. Sess. Laws 1211-45.

In *Woodworth*, Burns also proposed that courts should presume that property arose from marital efforts and therefore belonged to the marriage, unless a party could show otherwise.[299] As such, the ICA clearly favored the expectation that marital partners equally share burdens and resources and should likewise share the marital estate upon dissolving their partnership. It challenged the spouse seeking to deviate from this expectation to affirmatively state and prove his case.[300]

For several years following *Woodworth*, the ICA continued to issue decisions that used this partnership-based system of uniform starting points. With the exception of the Hawai'i Supreme Court decision in *Myers v. Myers*,[301] which invalidated the uniform starting point for dividing values accrued or acquired during the period beginning at DOFSICOD and ending at divorce (i.e., Category 6),[302] this system remained largely unscathed for

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[299] *See Woodworth*, 7 Haw. App. at 17, 740 P.2d at 41. For example, Burns wrote:

> The spouse who asserts that a NMV [net market value] is not a category 5 NMV [i.e., the prototypic marital category] has the burden of proving that assertion. In the absence of sufficient proof that a NMV is other than a category 5 NMV, then that NMV is a category 5 NMV and the USP [uniform starting point] for dividing it is 50 percent to the husband and 50 percent to the wife.

Id.

[300] *See id.*

[301] 70 Haw. 143, 764 P.2d 1237 (1988).

[302] *See id.* at 150, 764 P.2d at 1242. At issue were two items of property that appreciated greatly during the two to three year period between DOFSICOD and the divorce. The first was an option agreement (referred to in the opinion as the "Kaiser Option") to purchase real property which had been the site of Kaiser Hospital and on which the Hawai'i Prince Hotel now sits. *See id.* at 146, 764 P.2d at 1240. The second was an interest in a limited partnership holding Revere Copper stock (referred to in the opinion as the "Revere Copper investment"). Both had been purchased by Mr. Myers prior to DOFSICOD as identified by the family court. *See id.* at 146-47, 764 P.2d at 1240.

The trial judge equally divided the value accrued up to DOFSICOD then, pursuant to *Woodworth*, awarded all of the post-DOFSICOD appreciation to Mr. Myers who was the sole title-holder. *See id.* at 147, 764 P.2d at 1240. After the ICA upheld this portion of the decree as consistent with *Woodworth*, Mrs. Myers appealed to the Hawai'i Supreme Court. *See id.*

While keeping intact the remainder of USP framework, the high court struck down the uniform starting point—i.e., "in proportion to legal ownership"—for property acquired or accrued during the period between DOFSICOD and the divorce (i.e., Category 6). *See id.* at 153-54, 764 P.2d at 1243-44. The court found that this starting point amounted to a presumption that impermissibly stifled the discretion given to the family court by statute. *See id.* It found that the ICA's use of titular ownership as a starting point violated Hawai'i Revised Statutes section 580-47's mandate to look beyond mere title in dividing property. *See id.* at 153, 764 P.2d at 1243.

Given that the USP for the DOFSICOD-to-divorce period was devised to acknowledge the *de facto* end of the partnership, it was ironic that the high court alluded to the same partnership model in nullifying this particular USP. Stating that a final division of marital property "[could] be decreed only when the partnership is dissolved" the supreme court ostensibly rejected the

several years and set the standards on which family law practitioners and the family court came to rely.[303]

B. Gussin v. Gussin: Uniform Starting Points Crumble But Partnership's in the Crumbs

In 1992, however, the Hawai'i Supreme Court proceeded to finish what it had started in *Myers* and nullified the entire system of uniform starting points, striking out against what it deemed to be hard and fixed rules that unduly restricted the discretion of the family court as mandated by Hawai'i Revised Statutes section 580-47. Heralded as the "most significant Hawai'i divorce case decided by the Hawai'i Supreme Court in thirty-two years,"[304] the

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ICA's notion that a *de facto* end could precede the *de jure* dissolution of a marital partnership. *See id.* at 154, 764 P.2d at 1244.

To make the point, the high court noted that while some of the post separation growth was a result of Mr. Myer's efforts and skill, at least some of it arose from external forces such as rapid changes in the yen-dollar exchange rate which contributed to the increased marketability and value of the option. *See id.* at 153-54, 764 P.2d at 1244. The court considered this "passive appreciation" to be a significant factor that both the trial court and ICA ignored. *See id.* The court suggested that because it had nothing to do with affirmative acts by Mr. Myers, this kind of appreciation should be attributed to the continuing partnership and divided accordingly. *See id.* at 154, 764 P.2d at 1244. Had the court accepted Burns' notion that the partnership in fact devolved into something less, if not disappeared altogether at DOFSICOD, it might not have stressed this distinction since the appreciation, whether passively or actively obtained, would have been deemed outside the partnership.

[303] Pursuant to *Muraoka v. Muraoka*, 7 Haw. App. 432, 776 P.2d 418 (1989), standardized balance sheets or charts (called "Muraoka Charts") used for detailing family assets and liabilities were regularly prepared and submitted to the family court for review. Not only did these sheets include a reporting of the applicable assets and liabilities, they also incorporated the categories of net market values along with the concomitant uniform starting points developed by the ICA. *See* Memo of Senior Family Court Judge Daniel G. Heely to All Family Court Judges, Staff and Attorneys Regarding Muraoka Charts dated June 14, 1991.

While the genesis of this system of uniform starting points and net market values officially occurred in 1986, its basic structure was not much of a departure from the ICA's earlier system of general rules. If anything, a labeling change occurred rather than any grand internal overhauling. Thus, by the time the supreme court nullified uniform starting points in 1992, the system had been in place for almost a decade.

Amid concerns that the supreme court would ultimately go beyond its *Myers* decision and reverse the entire system of uniform starting points, House Bill No. 2470 was introduced to expressedly authorize courts to utilize a uniform decisional process akin to the kind devised by the ICA. H.R. 2470, 16th Legis., Reg. Sess. (1992). The intent of the proposed legislation was to prevent a return to the pre-USP era. Testifying in support of the bill were leaders of the bar's family law section and the family court. *See* Yamauchi, *supra* note 16 at 438-41. Despite the favorable support, the bill failed to pass. HAW. S. JOURNAL 1992, Reg. Sess. 1517 (1992)(while the bill cleared the State House, it failed to pass out of the State Senate).

[304] Yamauchi, *supra* note 16, at 423 (quoting Special Edition, H.S.B.A. FAM. L. SEC. J. HAW. FAM. L. NO. 7, Sept. 2, 1992, at 1).

supreme court's decision in *Gussin v. Gussin*,[305] left little of the Burns-built uniform decisional process.[306]

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[305] 9 Haw. App. 279, 836 P.2d 498 (1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 836 P.2d 484 (1992). Lori Yamauchi's article provided an interesting description of the cases and events leading to *Gussin*, and recorded the concern of practitioners and judges following *Gussin*. *See* Yamauchi, *supra* note 16, at 438-43.

[306] A year before the *Gussin* decision, Burns already appeared to sense that his uniform decisional process faced substantial opposition and imminent reversal from the supreme court. Perhaps goaded by a dissenting voice within his own court (starting with *Bennett v. Bennett*, 8 Haw. App. 415, 807 P.2d 597 (1991), Associate ICA Judge Walter Heen authored three concurring opinions expressing opposition to the system of uniform starting points), Burns elaborated on his reasons for insisting on a uniform decisional framework.

> In writing for the majority in *Bennett*, Burns reiterated that his framework was
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> . . . designed to standardize and facilitate the factual analysis, facilitate settlements, identify the reasons for a particular decision, facilitate appellate review, facilitate the continued case-by-case development of express and uniform ranges of choice applicable statewide to similar fact situations, and [brought] as much statewide consistency, uniformity, and predictability as is possible to family court decisions dividing and distributing property in divorce cases.

Bennett v. Bennett, 8 Haw. App. 415, 421, 807 P.2d 597, 601 (1991).

He then expanded on how uniform starting points made appellate review more meaningful in view of the "abuse of discretion" standard of review used in property division cases. *See id.* at 422-23, 807 P.2d at 602. Asserting that a trial judge's acceptable range of choices was of judicial and not legislative origin, Burns opined that absent any guidance in the form of uniform categories, starting points and range of choices, appellate courts had little choice but to either defer to the trial court's decision or impose a less deferential standard of review. *See id.* By having some guidelines on what choices were within the permissible range, appellate courts could better gauge if a trial court exceeded its discretion.

In *Bennett*, Burns also argued that prior supreme court decisions actually supported rather than proscribed his partnership-based framework. He wrote:

> The Hawaii Supreme Court has not disapproved of these developments. Moreover, the Hawaii Supreme Court has also imposed uniform limits on the family court's range of choice. For example, in Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986), the Hawaii Supreme Court concluded that "[i]t is generally accepted that each divorcing party is entitled to the date of marriage net value of his or her premarital property and the date of acquisition net value of gifts and inheritances which he or she received during the marriage" and that the "trial court may award up to half of [the during-marriage] appreciation [of separate property] to the non-owning spouse[.]" 68 Haw. at 389-90, 716 P.2d at 1138. Subsequently in Myers, it defined "marriage" as a "partnership," thereby deciding that partnership principles guide and limit the range of the family court's choices.

Bennett, 8 Haw. App. at 423, 807 P.2d at 602.

Then in *Gardner v. Gardner*, 8 Haw. App. 461, 810 P.2d 239 (1991), Burns affirmed that partnership principles guided property division in this state and that his system of uniform starting points was a working incarnation of those principles. After reviewing the progression of decisions from his court, he concluded:

> In our view, the uniform process we have developed is much better than the prior ad hoc process and is accomplishing its purposes outlined above. If there is a problem with the

In *Gussin*, the parties were married for eight years.[307] Entering the marriage, husband owned $42,982 in cash and an apartment worth $33,000.[308] During the marriage, husband sold the apartment and deposited the proceeds as well as the premarital funds into joint accounts.[309] From these joint accounts, the parties withdrew funds to purchase the jointly-held marital residence.[310] The purchase price was $300,000; the equity grew to $583,000 at the time of divorce.[311]

At the time of divorce, the estate of the parties was estimated at $820,000, the marital residence being the largest asset.[312] Of the $583,000 attributed to the marital residence, the family court first awarded $101,026 to husband, which represented a return of the date of marriage value of his cash and apartment with an adjustment for inflation.[313] The remaining value of $481,974 was divided evenly.[314] The wife filed an appeal arguing that the trial court erred in returning the date-of-marriage value of husband's premarital property.[315] She reasoned that husband's premarital property had "transmuted" into marital property or, in the alternative, had been gifted to her.[316]

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uniform process, it is with its implementation, not with the process itself. The appropriate solution to an implementation problem is to require proper implementation, not to discontinue the process.

Therefore, we reemphasize that the uniform process is only a process. USPs are only starting points. There are currently only a few limits on the family court's range of choice. Subject to these few limits, the family court currently has, and must knowledgeably exercise, a wide range of choice and equitable discretion when deciding how to divide and distribute property in divorce cases.

Id. at 469-70, 810 P.2d at 244.

Responding to Associate Judge Heen's challenge, Burns stiffly asserted:

[J]udge Tanaka and I conclude that as an appellate court we have the power to require all family court judges to start their equitable distribution analysis from uniform starting points. The primary purpose of categorization is to facilitate the uniform starting points and the uniform decisional process. If there can be no uniform starting points, then categorization and the uniform decisional process are exercises without any useful or meaningful purpose. Therefore, we reaffirm the categories, the uniform starting points, and the Muraoka decisional process.

Id. at 471, 810 P.2d at 244.

[307] *See Gussin*, 73 Haw. at 473, 836 P.2d at 487.

[308] *See id.* at 475, 836 P.2d at 487.

[309] *See id.*

[310] *See id.*

[311] *See id.*

[312] *See id.* at 473, 836 P.2d at 487.

[313] *See id.* at 476, 836 P.2d at 488.

[314] *See id.*

[315] *See id.*

[316] *See id.* The estate also included assets in Kaneohe, Kona and Kauai which had been husband's separate property. *See id.* at 477, 836 P.2d at 488. The during-marriage appreciation of these properties amounted to $120,796. *See id.* The family court awarded 100% of the date

Unlike *Myers*, which invalidated only the uniform starting point for values accrued after DOFSICOD, *Gussin* presented the court with net market values from a variety of categories, including premarital properties and their appreciation, and jointly held property acquired during the marriage. Thus, the court was in a position to cut a wider swath, and it did. Expressing the same concerns it had in *Cassiday*, the high court voided all remaining uniform starting points (i.e., for Categories 1 through 5) finding them to be "rebuttable presumptions" that "undeniably restrict[ed] the exercise of the family court's wide discretion."[317]

Cognizant, however, of the purposes and goals of the ICA's scheme,[318] the high court advised the following:

> To the extent that a certain degree of "uniformity, stability, clarity or predictability" of family court decisions can be attained, while . . . preserving the wide discretion mandated by H.R.S. [section] 580-47, judges are compelled to apply the appropriate law to the facts of each case and be guided by reason and conscience to attain a just result.[319]

The court then stated "we conclude that our acceptance of the 'partnership model of marriage' provides the necessary guidance to the family courts in exercising their discretion and to facilitate appellate review."[320]

While gutting the ICA's uniform decisional process, the *Gussin* decision affirmed the partnership model as a guiding model. However, it said little to help judges and lawyers transform rhetoric into practical application. What *Gussin* effectively did was return trial courts and attorneys to the pre-"general rule" era when each judge was called upon to discern as many relevant factors as he or she could, and to individually fashion a result that seemed equitable. The reference to "partnership principles" appeared well-intentioned but perfunctory without any cogent instructions to replace those created by the ICA.[321]

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of marriage value (with an adjustment for inflation) of these properties to husband and split the appreciation 85% to 15% in favor of the husband. *See id.* Wife objected to the application of an inflation factor to the principal which effectively lowered her 15% share in the appreciation to 12%. *See id.*

[317] *Id.* at 482, 836 P.2d at 490. The supreme court noted that Burns' relabeling of "general rules" to "uniform starting points" did not in any way resolve the high court's objections to rebuttable presumptions as stated in its *Cassiday* decision. *See id.* at 481, 836 P.2d at 490.

[318] The high court called the ICA's purposes and goals "commendable." *See id.* at 485, 836 P.2d at 492.

[319] *Id.* at 486, 836 P.2d at 492.

[320] *Id.* (emphasis added).

[321] In *Gussin*, Chief Justice Herman Lum wrote a dissent in defense of Burns' process of uniform starting points. Lum wrote that in the interest of giving litigants some modicum of predictability, the use of reference points from which to begin (and not end) an analysis was not violative of the Hawaii Revised Statute section 580-47(a)'s grant of judicial discretion in the

C. Tougas v. Tougas: A Begrudging About - (Saving) Face; Partnership Gets its Imprimatur

The supreme court's sudden dismantling of a familiar and well-accepted system of standards was predictably disruptive.[322] In addition, the discordance of seeing the court's support of partnership principles on one hand, and its rejection of rules arising from those principles on the other, was discomfiting.[323] Compelled by this, the Hawai'i Supreme Court in *Tougas v. Tougas*[324] made an apparent attempt to fill the void. While reaffirming its

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resolution of property disputes. *See Gussin*, 73 Haw. at 494-95, 836 P.2d at 496 (Lum, C.J., dissenting). Ironically, it was Chief Justice Lum who authored the 1986 *Cassiday* decision which reversed the ICA's "general rules." *See* Cassiday v. Cassiday, 68 Haw. 383, 716 P.2d 1133 (1986).

[322] Following *Gussin*, the *Journal of Hawai'i Family Law*, which represented the voice of the practicing family law bar, predicted dire consequences:

> The effect of *Gussin* is potentially quite adverse.
>
> (a) Because the requirement of the preparation and presentation of balance sheets detailing all family assets and liabilities under Muraoka v. Muraoka, 7 Haw. App. 432, 776 P.2d 418 (1989) has been effectively abolished by *Gussin*, there is a serious concern that many Family court practitioners will no longer take the time, and divorcing clients will no longer want to expend the resources required, to adequately organize and present the financial aspects of their cases, the result being that many cases will now be negotiated and tried without sufficiently comprehensive information regarding the nature and extent of the marital estate.
>
> (b) As a result of *Gussin's* invalidation of all of the guidelines that have heretofore allowed attorneys and judges to predict a reasonable range of outcomes, fewer cases will settle as each divorcing party will more likely believe that at least some judge unrestricted by any guidelines will agree with their subjective view of what is or is not "just and equitable" under the circumstances.
>
> (c) Cases will cost more to prepare and present, given the increased uncertainty as to what information is, or is not, essential or even relevant to the resolution of the economic issues in the case.
>
> (d) Outcomes will become more diverse, depending almost entirely on the individual ethics, values, and morality of the particular judge deciding the case.
>
> (e) Cases which are now pending in the family court may have to be delayed or suspended to allow attorneys to assess whether the fact that *Gussin* has completely changed the ground rules for dividing property incident to divorce requires an entirely new presentation of facts in each case.

Special Edition, H.S.B.A. FAM. L. SEC. J. HAW. FAM. L. NO. 7, Sept. 2, 1992, at 1-2.

[323] *See id.* at 2.

[324] 76 Hawai'i 19, 868 P.2d 437 (1994). This case presented a richer fact pattern when compared to *Gussin*. Ray Tougas had worked in the commercial underwater diving industry prior to marriage. *See id.* at 22, 868 P.2d at 440. Carol Tougas completed graduate work in public health administration prior to the marriage and had been a finalist for a position with the Hawaii Medical Service Association. *See id.* She went to work instead with husband who was then manager of Isle Dive. *See id.* Soon thereafter, the parties pooled their resources to form

rejection of the "hard and fixed" rules embodied in the ICA's framework of uniform starting points, the *Tougas* court clearly but cautiously responded to the confusion and discontent that followed *Gussin*.

First, the supreme court retained the ICA's five categories of net market values[325] and affirmed the ICA's assignment of partnership terms to at least three of the categories. Then, quoting a Burns-authored opinion, the court approved the following description:

> The NMVs [net market values] in Categories 1 [premarital property] and 3 [property acquired during marriage by gift or inheritance] are the parties' capital contributions to the marital partnership. The NMVs in Categories 2 ["during marriage" appreciation of Category 1] and 4 ["during marriage" appreciation of Category 3] are the during-the-marriage increase in the NMVs of Categories 1 and 3 properties owned at DOCOEPOT ["date of the conclusion of the

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their own commercial diving company with the wife in charge of administrative duties and the husband conducting diving services. *See id.* This all occurred during the parties' period of premarital cohabitation; living expenses were shared at the time. *See id.*

The parties' business flourished. The efforts of both contributed to the success. *See id.* The parties married in 1979 after five years of living together. *See id.* Just prior to the marriage, Ray purchased two condos. *See id.* The parties jointly bought a marital residence. *See id.* After the birth of a child in 1980, Carol worked part-time, conducting business from home. *See id.* at 22-23, 868 P.2d at 440-41.

During the marriage, the parties acquired additional properties and investments by way of a real estate investment company owned by Carol's father, Calvin Bright of California. *See id.* at 23, 868 P.2d at 441. Carol was also a partner/beneficiary of a partnership created by her parents prior to the Tougas marriage; this partnership was intended to benefit Carol and her siblings to the exclusion of spouses and significant others. *See id.* Ray signed a release of any interest in the partnership. *See id.* The value of the partnership assets was apparently significant. A second partnership was later created during the Tougas marriage and was intended to benefit only the Bright children although no specific release was signed by Ray. *See id.*

The parties separated in November of 1985 and Ray filed for divorce in January 1987. *See id.* Prior to trial, Ray filed a motion to compel discovery of the value of the Bright partnerships. *See id.* He argued that knowing the values of Carol's separate holdings was essential to making a fair and fully informed split of the marital estate, as well as, in correctly deciding child and spousal support. This resulted in a series of court proceedings in both California and Hawai'i which engendered full faith and credit issues. *See id.* at 24-25, 868 P.2d at 442-43. After a California appellate court granted Ray's request for financial information, Hawai'i's family court concluded that information regarding Carol's separate holdings, including her partnership holdings, was relevant to assessing her financial condition after the divorce and determining child and spousal support. *See id.* at 29, 868 P.2d at 447.

The family court judge evenly divided the marital residence. *See id.* at 25, 868 P.2d at 443. She also awarded Ray all of the premarital value of the diving business and 75% of the post marital value. *See id.* Carol's interests in the two Bright partnerships were left intact and she received the remaining 25% of the family business' post marital value. *See id.* Both parties appealed. *See id.*

[325] *See id.* at 27, 868 P.2d at 445.

> evidentiary part of the trial" - effectively, the date of divorce]. Category 5 is the DOCOEPOT NMV in excess of the Categories 1, 2, 3, and 4 NMVs. In other words, category 5 is the net profit or loss of the marital partnership after deducting the partners' capital contributions and the during-the-marriage increase in the NMV of property that was a capital contribution to the partnership and is still owned at DOCOEPOT.[326]

Referring to commercial partnership principles, under Hawai'i Revised Statutes section 425-118(a), the court acknowledged that "[e]ach partner shall be repaid the partner's contributions, . . . and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, . . . sustained by the partnership according to the partner's share in the profits."[327] The court then added "if there is no agreement between the husband and wife defining the respective property interests, partnership principles dictate an equal division of the marital estate 'where the only facts proved are the marriage itself and the existence of jointly owned property.'"[328] This could be fairly read to approach, if not endorse, the ICA's starting points for Category 1, 3 and 5; i.e., all things being equal, 100 percent of separate property to the owner spouse, and an even split of the marital property.[329]

Then in a surprising turn, the court acknowledged that while family court judges were accorded wide discretion, it was legitimate to expect a degree of "uniformity, stability, clarity or predictability" in judicial decision making, and that trial judges were therefore "compelled to apply *the appropriate law* to the facts of each case and be guided by reason and conscience to attain a just result."[330] The "appropriate law," declared the court, was the partnership model.[331]

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[326] *Id.* at 27, 868 P.2d at 437 (quoting Gardner v. Gardner, 8 Haw. App. 461, 467, 810 P.2d 239, 240 (1991)).

[327] *Id.* at 27-28, 868 P.2d at 445-46 (quoting *Gardner*, 8 Haw. App. at 464-65, 810 P.2d at 242).

[328] *Id.* at 28, 868 P.2d at 446 (quoting Gussin v. Gussin, 73 Haw. 470, 484, 836 P.2d 484, 491 (1992)).

[329] Less clear was whether *Tougas* provided guidance for the treatment of during-marriage appreciation of separate property, i.e., Categories 2 and 4. In quoting commercial property concepts, the supreme court left open the possibility that such appreciation could be considered "profits" of the partnership and therefore be divided equally. However, this seems somewhat discordant with the court's decision in *Cassiday* which capped at 50% an award of such appreciation to the non-owner spouse. The *Cassiday* decision viewed an even split as one extreme within a range of possibilities rather than a commonly expected result. This was resolved in more recent decisions.

[330] *Id.* (emphasis added).

[331] *Id.*

In essence, the *Tougas* decision was a begrudging concession to the ICA. *Tougas* acknowledged that partnership principles provided the foundation for decision making in property division, but that deviation would be required if these principles produced an unjust result. The high court cautioned against perfunctory applications and required that reason and good conscience determine the appropriateness of the partnership model.[332] Thus, in indirect terms, the court approved a process that provided a place from which decision makers could start but then quickly detour if appropriate. Forced to expand upon the partnership rhetoric of the *Gussin* decision, the *Tougas* court ostensibly tried to meet the call for certainty, uniformity, stability and predictability, while avoiding an embarrassing concession to the ICA's system of uniform starting points.

D. Hussey v. Hussey: Burns Gets the Last Word (For Now)

While accepting the Hawai'i Supreme Court's "concession,"[333] the ICA clearly favored more clarity and precision than the *Tougas* decision provided. Using *Tougas* and its explicit and more detailed endorsement of the partnership model, the ICA began work on a new structure that in some respects was more elaborate than the one voided in *Gussin*. Because its commitment to the partnership model was already demonstrated in its string of decisions spanning over a dozen years, this new structure was less an advancement of the model than it was a pragmatic device to ensure the kind of clarity that the ICA sought since the early 1980's.

The ICA was silent after *Gussin*. But seven months after the Hawai'i Supreme Court's *Tougas* decision, the ICA was ready to launch its response.[334] The lob was at once cautious and bold; cautious in how it threaded within the lines drawn by *Gussin*, bold in how it thrusted forward using what it had (and maybe more). The ICA's response came in the form

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[332] *See id.*

[333] Burns saw *Tougas* as an attempt by the high court to right its course. He described it as a return to sanity, akin to passing through adolescence and headed toward full adulthood:

> To me it's been like being involved with the growth of a child. Those of you who are parents who have lived through that process will understand. Our child was a terrible teen in 1992 when the Hawai'i Supreme Court's opinion in *Gussin* undid most of what had been accomplished in the prior twelve years. It took fifteen months for our child to pass through the terrible teen period, regain sanity and return to the path of maturity. That happened when the Hawai'i Supreme Court in 1994 filed its opinion in *Tougas*. And our child still has a way to go to becoming a mature child.

Chief Judge James Burns, Comments at the Family Law Section/HICLE Annual Divorce Update (Dec. 7, 1995).

[334] *Tougas* was decided on February 7, 1994. *Hussey* was issued on September 30, 1994.

of *Hussey v. Hussey*[335] which set the tone and direction for all post-*Gussin* ICA decisions to date.[336]

Benjamin and Rebecca Hussey were married on June 22, 1974, and had three children who were ages 16, 15, and 13, at the time of the divorce proceedings in May 1991.[337] The parties separated in April 1990.[338]

The divorce decree, filed on October 21, 1991, awarded custody of the children to plaintiff Rebecca and ordered Benjamin to pay $330 per month in child support.[339] At the time of the trial, Rebecca's gross income was $1,110 per month and Benjamin's was $1,216 per month.[340]

On the issue of property division, the trial court ordered the following awards which triggered Rebecca's appeal:

To Benjamin:

1. A residence at 3229 Ho'olulu Street in Kapahulu ("Kapahulu House"). Benjamin had inherited a remainder interest in the property subject to his uncle's life estate in 1967, several years before the marriage.[341] The uncle, who was age eighty-one at the time of trial, lived in the structure with Benjamin.[342] At trial, the fair market value ("FMV") was set at $410,000, a marked jump from a previous FMV of $84,500 in February 1977.[343] There was no evidence of the FMV at the time of marriage.[344]

The Kapahulu House was the marital residence from the time of marriage in June 1974 to the April 1990 separation.[345] The property was used to secure a $120,000 loan taken jointly by the parties and Benjamin's uncle.[346] This debt culminated a series of mortgage debts incurred during the marriage to pay the parties' personal debts and family expenses.[347]

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[335] 77 Hawai'i 202, 881 P.2d 1270 (Haw. Ct. App. 1994).

[336] At this writing, the ICA has reported four decisions after *Hussey*, including: Epp v. Epp, 80 Hawai'i 79, 905 P.2d 54 (Haw. Ct. App. 1995); Markham v. Markham, 80 Hawai'i 274, 909 P.2d 602 (Haw. Ct. App. 1996); Kreytak v. Kreytak, 82 Hawai'i 543, 923 P.2d 960 (Haw. Ct. App. 1996); and Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997). *See also infra* note 433.

[337] *See Hussey*, 77 Hawai'i at 204, 881 P.2d at 1272.

[338] *See id.*

[339] *See id.*

[340] *See id.*

[341] *See id.*

[342] *See id.*

[343] *See id.*

[344] *See id.*

[345] *See id.*

[346] *See id.*

[347] *See id.*

2. A $5,100 truck subject to a $4,000 debt.[348]

To Rebecca:

1. A residence at 1478 Kaleilani Street in Pearl City ("Pearl City House").[349] Rebecca had inherited the property from her mother who had died in 1983 but whose estate had not closed until 1989.[350] The trial court received no evidence regarding the FMV when Rebecca's interest vested in 1983.[351] The date-of-trial value was $175,000 subject to Rebecca's mortgage debt of $80,000, a part of which was used to make late payments on the debt secured by the Kapahulu house.[352]

2. A $2,000 bank money market certificate inherited from her mother.[353]

3. The proceeds from the sale of her 1987 Mazda with an estimated value of $11,000.[354] The court received no evidence on how much was received from the sale.[355]

Cast in terms of the categories of net market values preserved in *Tougas*, the award was as follows:

	Rebecca	*Benjamin*
Category 1		$ 84,500
Category 2		$205,500
Category 3	$97,000	
Category 4		
Category 5	$11,00	$1,100[356]

What apparently triggered Rebecca's challenge was how the trial court treated the "during marriage" appreciation of the Kapahulu House. The court gave all $205,500[357] to Benjamin although: 1) the property had been used to secure a loan that paid for marital and family debts;[358] 2) the loan was repaid in part by Rebecca;[359] and 3) Rebecca had resided on the property for most of

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[348] *See id.*

[349] *See id.*

[350] *See id.*

[351] *See id.*

[352] *See id.* at 204-05, 881 P.2d at 1272-73.

[353] *See id.* at 205, 881 P.2d at 1273.

[354] *See id.*

[355] *See id.*

[356] *Id.*

[357] The $205,500 figure was derived by subtracting the FMV in February 1977 ($84,500) from the FMV ($410,000 - $120,000 encumbrance) at the time of the divorce hearing. The family court apparently thought that the February 1977 FMV was an adequate substitute for the date-of-marriage FMV three years before. *See id.* at 204-05, 881 P.2d at 1272-73.

[358] *See id.* at 204, 881 P.2d at 1272.

[359] *See id.* at 205, 881 P.2d at 1273.

the parties' seventeen-year marriage.[360] The court reasoned that the appreciation was largely a passive one to which Rebecca contributed little, if anything at all.[361] In addition, the trial judge thought it unfair to force the sale of the home in order to apportion to Rebecca a share of the appreciation.[362]

For the ICA, this provided the fodder for its first foray since the *Gussin-Tougas* decisions. It began by recounting the lines drawn by the high court's decisions, including their clear reference to the use of partnership principles to guide and limit the range of the trial judge's statutorily mandated discretion.[363]

Then came the creative part. To start, the court defined three new terms: 1) Premarital Separate Property; 2) Marital Separate Property; and 3) Marital Partnership Property.[364] Premarital Separate Property ("PSP") referred to all property owned by each spouse immediately prior to marriage or to cohabitation culminating in marriage.[365] Upon marriage, all PSP converted to either Marital Separate Property or Marital Partnership Property.[366] The court determined that Marital Separate Property ("MSP") did not belong to the marital partnership and therefore could not be divided upon dissolution of the partnership.[367] Correspondingly, the court found that only property belonging to the marital partnership—i.e., Marital Partnership Property—could be divided.[368]

To determine what did not belong to the partnership, the ICA developed three categories of excluded property. These included all property, belonging to one or both spouses, that:

> (1) was excluded from the marital partnership by an agreement in conformity with Hawai'i's Uniform Premarital Agreement Act (Hawai'i Revised Statutes Chapter 572D);[369]
> (2) was excluded from the marital partnership by a valid contract;[370] or
> (3) was (a) acquired by gift or inheritance during the marriage, then (b) expressedly classified by the donee/heir spouse as his or her own separate property, and (c) after acquisition, maintained by itself and/or by sources other

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[360] *See id.* at 204, 881 P.2d at 1272.
[361] *See id.* at 205, 881 P.2d at 1273.
[362] *See id.*
[363] *See id.* at 206, 881 P.2d at 1274.
[364] *See id.* at 206-07, 881 P.2d at 1274-75.
[365] *See id.* at 206, 881 P.2d at 1274.
[366] *See id.*
[367] *See id.* at 207, 881 P.2d at 1275.
[368] *See id.*
[369] *See id.*
[370] *See id.*

than one or both spouses and funded by sources other than MPP or marital partnership income.[371]

Anything that meets one of the above definitions is MSP, while all else is MPP. The former is not divisible, the latter is. Where MSP conceivably impacts the final division is how it contributes to "the respective separate condition of the spouses."[372] For example, while MSP cannot itself be divided, it may, as a matter of fairness, sway a court to consider a lesser award of MPP to a spouse already in possession of a very large cache of MSP.

After determining what belongs to the partnership and is therefore available for division, *Hussey* instructs courts to appropriately slot the properties into the five categories of net market values. Tracking the *Gussin-Tougas* line that "[e]ach partner shall be repaid the partner's contributions . . . and share equally in the profits and surplus remaining after [satisfaction of] all liabilities, including those to partners," and drawing from *Tougas* the idea that partnerships assume the equality of all valid and relevant circumstances, the ICA advanced the following:

(1) That all Category 1 and 3 properties be considered "partnership contributions" and should therefore be repaid in whole to the contributing spouse; and
(2) That Category 2, 4 and 5 properties represent profits (or losses, if negative) of the partnership and should therefore be attributed in equal shares to each spouse.[373]

As with its earlier scheme, *Hussey* directed trial courts to deviate from this division when all valid and relevant considerations are not equal.[374]

While cast in terms of the partnership model set forth by the *Gussin* and *Tougas* decisions, *Hussey*, as a practical matter, was not a grand swing from its pre-*Gussin* predecessors. Where valid and relevant circumstances are equal, Category 1 and 3 net market values ("NMVs") continue to go to the contributing partner spouse (formerly the "owner" or "donee" spouse) while the Category 5 NMV is cleaved down the middle. The difference is in the Category 2 and 4 NMV which went from 75-25 in favor of the owner or donee spouse, to a 50-50 split.[375]

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[371] *See id.*

[372] *Id.*

[373] *Id.* at 207-08, 881 P.2d at 1275-76.

[374] *See id.* at 208, 881 P.2d at 1276.

[375] Actually, this scheme is reminiscent of what existed before the Hawai'i Supreme Court's *Cassiday* decision in 1986 which abolished the ICA's network of "general rules". The pre-*Cassiday* general rules also prescribed a 100-0 split of Category 1 and 3 type property and a 50-50 split of Category 2, 4 and 5 properties. *See supra* notes 252-53, 255 and 257 and accompanying text.

Having rebuilt its sand castle,[376] the ICA was ready to go again. It seized upon the family court judge's rationale for awarding all of the appreciation on the Kapahulu House to Benjamin. Under the new scheme, the appreciated value (Category 2) would be divided equally if all valid and relevant considerations were equal.[377]

The fact that the trial court had chosen to direct no part of the appreciation to Rebecca suggested that it found valid and relevant factors tilting against her. As noted earlier, the family court judge determined that the marked growth in the value of the Kapahulu House had been a passive one, a function of local real estate conditions during the marriage.[378] What the judge was looking for was evidence of Rebecca's direct and specific contribution to the increased value. For example, if some of the marital debts had been incurred to improve the property, the trial court might have been inclined to make an award to Rebecca.[379]

The ICA rejected this, finding instead that:

> A spouse's involvement or non-involvement in the existence of a Category 2 NMV is not a valid and relevant consideration for deviating from the Partnership Model. The fact that the spouse-non-owner did not directly and materially

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[376] In my family law lectures, I have characterized the development of case law from *Woodworth* to *Hussey* as sand castles continually being built, knocked down and rebuilt by Burns. Like the building of sand castles, the new structure never quite looks like the one just leveled. One rebuilds with what is available guided in part by a memory of the previous structure's best reproducible features.

[377] At the time of trial, *Gussin* and *Tougas* had not yet been decided. Thus, the guiding principles at trial were derived from the ICA's line of decisions following the supreme court's 1986 *Cassiday* holding. Accordingly, the starting point for Category 2 net market values was 75% to the owner spouse (Benjamin, in this case) and 25% for the non-owner spouse (Rebecca). *See Hussey*, 77 Hawai'i at 208, 881 P.2d at 1276. Awarding 100% of the appreciated value to Benjamin meant that the trial court needed to have valid and relevant considerations for taking the 25%, which would have otherwise been awarded to Rebecca, and giving it to Benjamin.

[378] "Like the real estate in Hawaii, the home just being where it's at[,] irregardless [sic] probably of the state that it's in[,] the appreciation worked on itself and it just built up just because it was in Kapahulu in a nice location." *Id.* at 202, 881 P.2d at 1273.

[379] The trial judge made the following statement:

> [Y]ou [Rebecca] make an argument that the property . . . was a marital asset and that both parties contributed to the build up of the appreciation of the property. Unfortunately, I cannot agree with that . . . I didn't hear a shred of evidence that said that . . . [t]he only testimony I heard was that the money was used to buy cars, pay off credit card loans, buy clothes for the children and other household items . . . [s]o I cannot agree . . . that this property was used . . . for the building up of the property and the appreciation that has gone with it.

Id. at 205, 881 P.2d at 1273.

> contribute to a Category 2 NMV is not a valid and relevant consideration for awarding the spouse-non-owner less than one-half of that Category 2 NMV.[380]

The matter was then remanded to the trial court for reconsideration.[381]

With its *Hussey* decision, the ICA broke a two-year silence,[382] returning with a framework that, while employing different terms, functioned much like the one used before the Hawai'i Supreme Court's *Gussin* 1992 decision. If there was a major change, it was in how property could be designated as non-partnership or "marital separate property" and therefore excluded from division.[383] The court required clear and definitive evidence proving the intent

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[380] *Id.* at 208, 881 P.2d at 1276.

[381] *See id.* at 208-09, 881 P.2d at 1276-77.

[382] This is not to say that the ICA was completely silent for the two year period between *Gussin* and *Hussey*. It continued to issue decisions impacting aspects of domestic relations. However, it was in *Hussey* that the court took its next significant step toward advancing the partnership model.

[383] The ICA stated that while one's marital separate property could neither be divided nor serve as an offset against one's share of the marital partnership property, such property could be used by a trial court to "alter . . . the ultimate distribution of [Marital Partnership Property] based on the respective separate conditions of the spouses." *Id.* at 207, 881 P.2d at 1275 (quoting Tougas v. Tougas, 76 Hawai'i 19, 32, 868 P.2d 437, 450 (1994)). This ability to glance back at marital separate property indicates that although the marital partnership model derives certain principles from commercial partnerships, it is not a clone.

In delineating a category of property to be excluded from the partnership, the court recognized the divide between the marriage as a partnership entity and the non-partnership interests that the individual spouses might hold. This is consistent with commercial partnerships in which partners maintain assets (and a life) outside the partnership. Upon dissolution, such assets are not ordinarily subject to division and distribution to other partner.

On the other hand, the court leaves trial judges with the option to look at a spouse's non-partnership holdings to help make an equitable distribution of the marital estate. *See id.* Thus, a spouse with large marital separate property holdings might be awarded a smaller share of the partnership pie. This is not ordinary business partnership practice. Taking its lead from Hawai'i Revised Statutes section 580-47 and the *Tougas* opinion which noted that the family court should consider the condition of the parties after the divorce, the ICA determined that, in some cases, doing so meant having to look at a spouse's marital separate property. How a trial court actually reviews and factors in marital separate property remains unanswered. How it avoids effectively using marital separate property as a rough offset against a marital partnership property award may pose a difficult challenge.

Notwithstanding this new conundrum, assessing each parties' condition after the divorce to include a review of each parties' extra-partnership holdings highlights a presumed centrality of marriage and curtails the erosion of marital sharing that occurs when spouses are permitted to insulate certain properties from the partnership. Why do we care far less about the condition of two parting commercial partners if their condition resulted from the application of a valid agreement, the provisions of a partnership statute, or both? Could it be that we simply expect much more of marriage partners, as well as, of marriages? Thus, we resist attempts to contractually limit marital obligations because they reflect an individual self-interest that contradicts our cultural expectation of altruism, compromise and mutuality within marriage.

and act of insulating property from the partnership. How much and what kind of evidence is needed to meet the court's standard of proof, at least where intramarital gifts and inheritances are concerned,[384] remains subject to debate.

The *Hussey* decision resurrects the structure - and with it, the certainty, stability, predictability, and uniformity long sought by the ICA - that was ostensibly leveled by the *Gussin* decision. By adding a mechanism for excluding property from the partnership, the ICA drew a palpable boundary between what belonged and did not belong to the partnership. In doing so, the ICA gave the marital partnership model a more tangible and developed feel. It was as if the ICA, having construed the *Tougas* decision as a "green light" to proceed with the partnership model, found the verve to elevate the model to another level. Whether this move actually goes beyond what the Hawai'i Supreme Court intended may well be fodder for another appellate decision.[385]

But more than resurrecting an analytical framework to guide the day-to-day decisions of parties, practitioners and judges, the *Hussey* decision highlighted the expectations of the partnership model. The next and final section describes and discusses these expectations.

IV. HUSSEY AND HEIGHTENED EXPECTATIONS

The partnership model of marriage is seductive in its ideal of the egalitarian marriage premised on equal power, sharing, and mutual commitment. It attempts to integrate and promote current cultural ideals regarding marriage and gender positions.

Apart from encapsulating these ideals, the model has a remedial aspect. With the advent of at-will divorces, a method had to be devised to secure some modicum of wealth for a dependent spouse (which more often than not meant a female homemaker), who previously relied on long-term marriages as the

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And so, while we may permit spouses to remove property from the partnership via agreement, we may also hold them to an obligation to relieve need or compensate for losses arising from the now-dissolved marriage. Looking at the size of extra-partnership holdings to help weigh the post-divorce disruptions experienced by each partner signals the ICA's reluctance to fully segregate the non-partnership sphere from the marital partnership.

[384] Gifts or inheritances received during marriage can become marital separate property if they are "expressly classified" by the recipient spouse as such. *See supra* note 371 and accompanying text. What "expressedly classified" entails is an arguable point.

[385] One could argue, for example, that Hawai'i Revised Statutes section 580-47(a)(3), which mandates the division of the parties' estate, "whether community, joint or separate," would prohibit the "stashing away" of separate property. While courts and legislatures have long recognized the right of spouses to make and enforce agreements among themselves, an overextension of the right to exclude properties from the partnership may have the effect of stepping back into the days of title-based property distribution.

primary source of financial support.[386] Thus, the partnership model distanced itself from title-based theories of property division which favored the spouse who legally owned or funded property. It replaced these theories with one which assumed that spouses contributed to the marriage in different but equally powerful ways and were therefore entitled to an equal share of the marital partnership property. This is not to say that the traditional breadwinner-homemaker pairing is the dominant marital arrangement or even a prevalent one requiring constant remediation. The partnership model should be flexible enough to reach all combinations of divided labor within marriages, but be particularly responsive to arrangements that have historically left one spouse at a severe disadvantage. To say that the model has a remedial aspect refers to this capacity to respond when called to do so.

In Hawai'i, appellate courts never alluded to this remedial aspect but shaped a version of the partnership model that promoted it. Spurred by Hawai'i Revised Statutes section 580-47(a)(3), which mandated the division and distribution of the parties' estate, "whether community, joint or separate," Hawai'i courts cast a wide net on what was at least theoretically divisible and distributable.[387] That the appreciation of separate property during the marriage was also subject to distribution, at least on a limited basis,[388] added to the divisible estate. By maximizing the "size of the pot," Hawai'i courts were positioned to increase the size and amount of property awards to a

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[386] *See supra* notes 41, 77, 111, and 159 and accompanying text.

[387] *See supra* note 25 and accompanying text. Hawai'i remains in the minority of states that permits the division of non-marital property. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Take Spotlight*, 29 FAM. L.Q. 741, 774 (1996).

[388] In *Cassiday v. Cassiday*, 68 Haw. 383, 716 P.2d 1133 (1986), the Hawai'i Supreme Court affirmed the ICA's position that appreciation of separate property during marriage could be divided and distributed to the spouse who did not own the principle property. *See id.* at 388, 716 P.2d at 1137. However, the high court capped the award at 50%. *See id.* at 389, 716 P.2d at 1138. This remains the high court's position.

In *Hussey v. Hussey*, the ICA seemed to suggest that such appreciation should receive treatment similar to Category 5 property; i.e., start with an equal division and allow deviation if valid and relevant considerations justify it. 77 Hawai'i 202, 207-08, 881 P.2d 1270, 1275-76. The court was strangely silent about the 50% cap. In its first decision following *Hussey*, *Epp v. Epp*, the ICA again grouped Category 2 property with Category 5, finding that both represented profits of the partnership to be divided equally. 80 Hawai'i 79, 91-92, 905 P.2d 54, 66-68 (Haw. Ct. App. 1995). The suggestion was that beginning with *Hussey*, Category 2 and 4 properties were to be treated like Category 5 without the 50% cap on awards to the non-owner spouse. This, too, would have favored the maximization of property available for division. However, in *Markham v. Markham*, the ICA clarified its position, realigning it with the 50% cap set forth in *Cassiday*. 80 Hawai'i 274, 286, 910 P.2d 602, 614 (Haw. Ct. App. 1996).

dependent spouse.[389] However, the size of the pot is only relevant if adequate and fair distributions are made. This is where the partnership model, as rebuilt by the *Hussey* decision and its progeny,[390] is ultimately tested.

Hussey did more than lay out a straightforward scheme which approximated the property distribution provisions of Hawai'i's commercial partnership statute. It reasserted expectations that exceeded those ordinarily held among business partners.[391] Having received an apparent albeit reluctant endorsement from the *Tougas* opinion, the ICA leapt at the chance to spell "partnership" in capital letters.

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[389] The ICA's focus on net market values rather than on individual items of property tends to favor the marital partnership over individual ownership interests. For example, returning the "date-of-marriage" net market value of premarital property to the owner spouse while splitting the appreciation accrued during marriage, facilitates a disassembling of separate property. As a practical matter, parties seeking to preserve an item of separate property may have to provide some form of an equalization payment.

The courts also widened its net by adopting a liberal definition of what was "property." In *Linson v. Linson*, the ICA construed the divisible and distributable "estate of the parties" to include "anything of present or prospective value." 1 Haw. App. 272, 278, 618 P.2d 748, 751 (1980). The *Linson* case involved non-vested retirement benefits.

In addition, the courts' lengthening of the period of the marital partnership from the time of non-marital cohabitation, assuming that the cohabitation led to marriage, *Malek v. Malek*, 7 Haw. App. 377, 768 P.2d 243 (1989), through the date of the divorce hearing, *Myers v. Myers*, 70 Haw. 143, 764 P.2d 1237 (1988), effectively maximized the period during which property was deemed part of the marital estate.

The ICA also placed the burden of proof upon a party seeking to categorize property outside Category 5. *See* Woodworth v. Woodworth, 7 Haw. App. 11, 17, 740 P.2d 36, 41 (1987). This also had the effect of keeping property within the partnership rather than outside of it.

On the other hand, the *Hussey* court's decision to create a category of property that was excluded from the partnership and not subject to division has the apparent effect of diminishing the pot. However, this diminution may, in some cases, not be as great as it appears. *See supra* note 383 and accompanying text.

One clearer instance in which Hawai'i courts appeared to protect separate property was in the rejection of "transmutation," a process by which separate property is presumably "transformed" to marital property when certain acts—such as the commingling of separate property with marital property—occur. *See* Gussin v. Gussin, 73 Haw. 470, 487, 836 P.2d 484, 492-93 (1992). Instead, the party who argues that a transformation occurred bears the burden of proving the elements of a gift—donative intent, acceptance and delivery. *See id.* at 489, 836 P.2d at 494. It should be noted, however, that the rejection of transmutation had more to do with the supreme court's aversion to "rebuttable presumptions" than protecting separate property. *See id.* at 488, 836 P.2d at 493.

[390] *See supra* note 336.

[391] There have been concerns that the allusion of the supreme court and ICA to commercial partnership law represent an undue attempt to constrain marital partnerships to the mold and personality of business entities. *See* Yamauchi, *supra* note 16, at 441 (a quote from Charles Kleintop, Chair of the Hawai'i State Bar's Family Law Section in 1992, suggested that some of the assumptions in a business partnership were not transferable to a marital partnership, such as the impersonal arms-length position between commercial partners).

First, it strengthened the expectation that all premarital properties (Category 1) and gifts and inheritances acquired during marriage (Category 3) were contributions to the marital enterprise for the purpose of advancing and generating profits for the marriage. If a partner chose not to make the contribution, he had to affirmatively act to indicate so.[392] Like capital contributions or advances that commercial partners bring into a venture, Category 1 and 3 properties are assumed to provide resources which may be used to advance and fund the operations of the marriage. However, unlike commercial ventures where partners decide what portion of their personal resources are to be invested into the partnership, Hawai'i's marital partnerships start with the premise reversed. Consistent with the sharing aspect of marital partnerships, spouses are presumed willing to contribute *all* premarital properties, and gifts and inheritances acquired during marriage, to the partnership.[393] By placing the burden on a spouse to specifically exclude her separate property from the partnership, the ICA created an expectation that favored mutuality over individual self-interest.[394]

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[392] *See Hussey*, 77 Hawai'i at 207-08, 881 P.2d at 1275-76.

[393] While the property is deemed a capital contribution, it remains the "separate" property of the owner spouse unless it is clear that a gift to the partnership was made. This duality of being contributed while remaining separate, finds its roots in the Spanish Civil Code which was the primogenitor of the partnership model.

The Spanish law of community was one "of acquests and gains *during* the marriage" thereby leaving property acquired before the marriage as the non-communal or separate property of the owner spouse. *See* 1 WILLIAM QUINBY DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 149 (1943)(emphasis added). However, it was assumed under the civil code system "that each spouse would bring into the marriage some property, and in the early days of a primitive society, this was usually the case." MCCLANAHAN, *supra* note 30, at 40. The husband usually brought land, and perhaps, money, cattle and agricultural or shop equipment, the wife usually brought money, goods and chattels, and perhaps land. *See id.* This was the capital with which the marital partnership was formed. *See id.*

Thus, the expectation was not that one's premarital property would lose its separate identity and merge fully into the partnership but that it would serve as capital or the raw material with which the partnership advanced itself financially and otherwise. It was the *profits* arising from the use of such separate property that would become true marital property to be divided equally among the spouses. *See Epp*, 80 Hawai'i at 92, 905 P.2d at 67 (quoting Gardner v. Gardner, 8 Haw. App. 461, 464, 810 P.2d 239, 242 (1991)). The raw material itself would remain the separate property of the owner spouse to give him or her some independent financial means after family needs were adequately met. *See* Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 589 (1974).

Thus, it follows that on divorce, the owner spouse is returned his or her contribution if funds remain after partnership debts are paid and no circumstance exist to justify awarding a share of the property to the non-owner spouse.

[394] If the sweetness and romance of most weddings are any indication, an assumption favoring mutuality represents the norm more often than not. Newlyweds ride on hopes of unspoken and unabridged commitments which include the sharing of premarital estates. It is

The *Tougas* court's decision to continue using net market values helped drive the point home. Free to deconstruct property into categories of values, the ICA could assert once again that a contributing spouse could only expect to recoup the value of his initial contribution and not the physical property itself. This reinforced the fact that the property was indeed contributed.[395]

The ICA made the point again this year in *Jackson v. Jackson*.[396] The court was faced with the question of whether to give a spouse Category 1 credit for

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the heat of a dissolving marriage that erodes the memory of once noble aspirations and remolds parties to the self-interested positioning that more typifies business partners.

If the low incidence of written prenuptial agreements continues to be the norm, the *Hussey* decision will tend to uphold the assumption that parties willingly contribute their separate properties to the partnership.

[395] In *Hussey*, for example, the trial court awarded to the spouses the real property that each acquired as separate property. 77 Hawai'i at 204, 881 P.2d at 1272. Thus, the husband received the marital residence to which he acquired title premaritally while the wife received the house and land in Pearl City which she obtained by way of an inheritance during the marriage. *See id.* The family court seemed content that each spouse left the marriage with a home, and found it fair (and probably convenient) to tie the award to the separate estate of each spouse.

The problem, however, was that the husband's Kapahulu House had, by the trial court's finding, netted an appreciation of about $200,000 during the seventeen-year marriage while the wife's property had not enjoyed any appreciation. *See id.* at 205, 881 P.2d at 1273 (actually, the trial court had used several questionable premises for assessing value and appreciation, premises that were left unaddressed by the appellate court). Thus, the family court's decision, which was essentially a title-based one, left each spouse with homes of vastly different values (husband's was worth about $285,000, wife's was valued at $97,000). *See id.*

The family court justified its decision by pointing out that much of the appreciation in husband's Kapahulu House had essentially been passive and not due to any direct contribution by the wife. *See id.* The trial judge also rejected the fact that the spouses had used the property to secure a mortgage obtained to cover family debts. *See id.* The judge indicated that he might have felt differently had the mortgage been used to actively improve the property. *See id.* The trial judge also found it unjust to force the husband to liquidate the property just to give the wife her share of the appreciation. *See id.*

Writing for the ICA, Burns found that the trial judge had acted inappropriately. *See id.* at 206, 881 P.2d at 1273. Assuming that all valid and relevant considerations were equal, Burns determined that each spouse should have recovered the date-of-marriage or date-of-acquisition value of his or her separate property and been awarded a 50% share of the during-marriage appreciation of such property. *See id.* at 207-08, 881 P.2d at 1275-76. Burns found nothing in the trial court's reasoning to justify a deviation from this, and rejected the trial judge's statement that it was unfair to order the sale of the Kapahulu House just so the wife could receive a share of its "during marriage" appreciation. *See id.* at 208, 881 P.2d at 1276.

In fact, the Kapahulu House had been used as contemplated by the partnership model. While remaining in the separate estate of the husband, it was offered and used as the family home for sixteen years. Its equity was used to borrow money so the personal and household debts of the spouses and their children could be paid. Similarly, wife had contributed her separate real property to secure a loan, a part of which was used to cover the debt secured by her husband's separate real property.

[396] 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997).

premarital property that no longer existed at the time of the divorce.[397] There had been a sense that if property did not exist at the time of divorce, its NMVs could be ignored.[398] However in *Jackson*, the ICA affirmed that if premarital property was contributed, but was no longer in existence for reasons other than gifting (which would either place the property into a category other than Category 1 or outside the partnership), the contributing spouse should have restored to him the initial amount of the contribution.[399] This decision goes out on a limb to acknowledge the contribution by authorizing its return to the contributing spouse, even while decreasing the amount of net market values available for equal distribution.[400] In so doing, the ICA elevated the term "contribution" beyond rhetoric and gave it a bite.

All things equal, it is the profits (i.e., net market values under Categories 2, 4 and 5) generated by these contributions that the marital partners should expect to share equally regardless of who made the contribution or its nature, extent and size.[401] In a sharing relationship such as the one embodied by the partnership model, spouses ideally give their all, not to enjoy a profit commensurate with their individual effort, but to earn a gain that is brought home for the benefit of the marital unit.[402]

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[397] *See id.* at 335-36, 933 P.2d at 1369-70.

[398] In fact, husband stated that the family court had adopted an unspoken policy of denying Category 1 credit if the subject property did not exist at DOCOEPOT. *See id.* at 335, 933 P.2d at 1369 n.10.

[399] The court actually stated, "[i]f a party does not own the Category 1 property at the DOCOEPOT, that Category 1 NMV is a part of the total of the DOCOEPOT NMVs and is subtracted from the Category 5 NMVs." *Id.* at 336, 993 P.2d at 1370.

[400] An example in the *Jackson* case was the value of seventeen lots in Haiku, Maui which were owned by husband's general contracting firm, Jackson Construction, which in turn, was a subsidiary of husband's successful drywalling company Oahu Interiors. *See id.* at 323, 326, 336, 933 P.2d at 1357, 1360, 1370. The lots were valued at about $567,000 at the date of marriage. *See id.* at 336, 933 P.2d at 1370. Before the end of the marriage, the lots were sold and therefore no longer in the marital estate at the time of the divorce. *See id.* at 326, 933 P.2d at 1360. It is assumed that the proceeds of the sale were absorbed into the general assets of Jackson Construction.

If the net market value of Jackson Construction increased during the marriage, that increase, which could have included growth of the funds earned through the sale of the Haiku properties, would have been placed into Category 2 which as a starting premise, could be divided 50-50. The ICA's decision effectively secured $567,000 of the company's net market value at divorce and credited it to the husband in recognition of his initial contribution.

[401] The ICA stated the principle this way: "The legal principle that unequal contributions by the partners to an equal partnership do not change the equality of the partnership applies to unequal contributions at the start of the marital partnership and to unequal contributions during the marital partnership." Epp v. Epp, 80 Hawai'i 79, 94, 905 P.2d 54, 69 (1995).

[402] Thus, in both *Epp*, 80 Hawai'i at 94, 905 P.2d at 69, and *Jackson*, 84 Hawai'i at 333-34, 933 P.2d at 1367-68, the ICA rejected arguments that the size and extent of a party's Category

Although we intuitively legitimize sharing of marital profits that appear in the form of Category 5 net market values (such as that of the marital residence acquired and owned jointly by the spouses or a joint bank account opened by the spouses and funded by their marital earnings), doing so for the "during marriage" appreciation (Categories 2 and 4) of separate property is less automatic. In fact, states have run the gamut in viewing the appreciation of separate property, ranging from those that define the growth in separate property as "separate" to those that consider such growth to be the product of marital labor and therefore "marital."[403]

Even before the *Hussey* decision, Hawai'i's appellate courts tended to weigh in on the side of awarding a portion of such appreciation to the non-owner spouse.[404] *Hussey* unequivocally reasserted this position, stating that the Category 2 and 4 net market values (i.e., the "during marriage" appreciation of Category 1 and 3 properties respectively) were marital profits and therefore belonged to the marital partners rather than to the owner spouse.[405] By doing this, the ICA not only expanded the range of marital, as opposed to separate properties, but emphasized the expectation that the toil of spouses should always be turned toward the betterment of the marital enterprise.[406] Thus, when a spouse spends time and effort during the marriage improving property acquired premaritally, and the property increases in value, she should understand that the appreciation belongs equally to her and her spouse. The result would be the same even if she solely used other separate property to

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1 contributions to the development of Category 2 and Category 5 NMVs entitled that party to a larger distribution of those net market values.

[403] Reynolds, *supra* note 30, at 286. Reynold's article contains an informative description of this range.

[404] Recall that in *Cassiday v. Cassiday*, the Hawai'i Supreme Court rejected the ICA's use of general rules, reasoning that such rules unduly burdened the trial court's statutorily mandated discretion to fashion an equitable distribution of property. 68 Haw. 383, 388, 716 P.2d 1133, 1137 (1986). But even while (temporarily) putting an end to the ICA's practice of generating rules, the high court stated its own rule: that a trial court could award up to one-half of the appreciation of separate property to the non-owner spouse, if it was fair and equitable to do so. *See id.* Although the one-half cap marked the court's regard for separate estates and their identity, it also suggested the court's view that the intra-marital growth of separate estates could be marital and therefore distributable to the "non-owner" spouse at divorce.

[405] Hussey v. Hussey, 77 Hawai'i 202, 207-08, 881 P.2d 1270, 1275-76 (Haw. Ct. App. 1994).

[406] In referring to the Spanish civil code and Visigothic laws and customs as primogenitor to American community property law, William DeFuniak wrote:

> [A]lthough each spouse retained ownership of his or her separate property, each unselfishly and unhesitantly had at heart the success and well-being of the marital union and that, accordingly, the fruits and income of all property of each naturally were to be devoted to the benefit of the marital union.

1 DEFUNIAK, *supra* note 393, at 180.

produce the result and her husband did not directly participate in developing the growth of the property.

The ICA labeled such effort "marital partnership activity" or a form of marital labor.[407] Using this "partnership" label, the court asserted that the post-divorce sharing of the during-marriage growth in separate property had little to do with the non-owner spouse's specific contributions to the growth.[408] In the past, courts struggled to find and roughly equalize contributions (i.e., homemaking vs. breadwinning, direct vs. indirect) to justify sharing the appreciation.[409] This is no longer the case, at least not since *Hussey*.[410] Classifying an owner spouse's efforts as a form of *marital* labor makes *that* spouse's activity sufficient to create an entitlement for the entire partnership. The alternative would have been to follow the more intuitive path and describe such efforts in terms of separate gain or self-interest. Choosing against this path reflects the court's unflinching commitment to promoting the marital partnership.

The court's path could also be a discomfiting one. For example, when the ICA in its *Epp* decision wrote, "(d)uring a marriage, both partners enjoy the consequences of one partner's successes,"[411] did it intend to allow a slothful partner to fully benefit from the toils of the other? The partnership model

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[407] *See* Epp v. Epp, 80 Hawai'i 79, 91, 905 P.2d 54, 66 (Haw. Ct. App. 1995); *see also* Jackson v. Jackson, 84 Hawai'i 319, 333, 933 P.2d 1353, 1367 (Haw. Ct. App. 1997).

[408] In a number of post-*Hussey* cases, the ICA summarily rejects as irrelevant and invalid the argument that the owner spouse's skill and effort solely resulted in the growth of his separate property. For example, the ICA in *Epp* ordered the trial court to reconsider its award of 100% of Category 2 net market values to the owner-wife, rejecting the wife's argument that her husband's involvement in the property was nil, that his involvement did not go beyond the bald fact of the marital partnership, and that the couple operated in fact as a non-partnership. *See Epp*, 80 Hawai'i at 92, 905 P.2d at 67. Because there appeared to be no evidence of any written agreement regarding the separate properties in question, the court seemed prepared to assume a legal and *de facto* marital partnership and to proceed from there. *See id.* at 92-93, 905 P.2d at 67-68.

[409] In *Cassiday v. Cassiday*, although the supreme court still looked at specific contributions from the non-owner spouse, it began to inch away from this kind of analysis and toward a new partnership-centered theory which considered how the marriage itself contributed to the preservation or accumulation of separate property. 68 Haw. 383, 387, 716 P.2d 1133, 1137 (1986).

[410] In *Hussey v. Hussey*, the ICA announced that "(a) spouse's involvement or non-involvement in the existence of a Category 2 NMV [net market value] is not a valid and relevant consideration for deviating from the Partnership Model." 77 Hawai'i 202, 208, 881 P.2d 1270, 1276 (Haw. Ct. App. 1994). In determining the relevance of Rebecca Hussey's lack of direct contribution to the "during marriage" appreciation of the Kapahulu home, the court wrote, "that the spouse-non-owner did not directly and materially contribute to a Category 2 NMV is not a valid and relevant consideration for awarding the spouse-non-owner less than one-half of that Category 2 NMV." *Id.*

[411] *Epp*, 80 Hawai'i at 92, 905 P.2d at 67 (quoting Hatayama v. Hatayama, 9 Haw. App. 1, 12, 818 P.2d 277, 283 (1991)).

should assume and encourage full commitment to the marital enterprise by *both* spouses.[412] Thus, while judges may no longer need to wrestle with how a non-owner spouse specifically helped to increase the value of the other spouse's separate property, they should hold fast to expectations that each spouse strove to advance the family and the marital unit. Ideally, the marital partnership is one which fosters acceptance of a 50% return on a 110% effort by both partners.

Applying the label "marital partnership activity" to the work of an individual spouse upon his separate property is consistent with the whole partnership construct. If Category 1 and 3 properties have in a real way been integrated into the partnership in the form of capital or an advance, it follows that working on such properties to increase its value has a similarly integrated quality. Also, if there is an overarching expectation of sharing, a partner who expends efforts for individual gain does so at the expense of the marriage, an expense that can be more easily recouped if the profits are deemed marital rather than separate. To expect otherwise would work against the partnership. If the marriage cannot exact a price upon the single-minded efforts of one spouse to accumulate individual wealth while supposedly laboring under some expectation of sharing, there would be no disincentive for pursuing the development of one's separate estate to the detriment of the partnership. It would diminish the meaning of Category 1 and 3 net market values as contributions.

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[412] In *Jackson v. Jackson*, 84 Hawai'i 319, 933 P.2d 1353 (Haw. Ct. App. 1997), the ICA implied this expectation. In rejecting the argument that the wife was not entitled to a larger share of the appreciation in husband's Category 1 property because of her non-involvement in the growth of that property, the court wrote the following:

> Marital partner B's during-the-marriage noninvolvement in the management and maintenance of marital partner A's premarital investment property is no more a relevant and valid factual consideration for reducing marital partner B's Partnership Model share than marital partner B's preparing all of marital partner A's meals or doing all of the housework are relevant and valid factual considerations for increasing marital partner B's Partnership Model share.

Id. at 333, 933 P.2d at 1367.

That the court decided not to "bean-count" specific contributions to the growth of a particular property or to the size of the marital estate did not mean that it stopped expecting each spouse to apply some threshold of effort or resources to the advancement of the marital unit. This threshold should at minimum reflect a good faith effort to contribute to the marital unit in the many different and important ways that family members are called on to pitch in. Meeting that threshold, whether a spouse's efforts occurred in the workplace, at home, or both, should generally entitle the spouse to an equal partner's share of the marital estate.

If the court were to cease having high expectations of each spouse, a spouse could choose to breeze through the marriage without "lifting a finger" then expect to collect his partnership share of the marital estate at divorce. This would be an unfair result.

The ICA provided a way to avoid these stringent expectations. By creating a category of "marital separate property" into which spouses may affirmatively and clearly segregate separate property from the partnership, the court allowed spouses to "switch off" the partnership rules for those properties.[413] Those who feel strongly enough to buck the norms of marital sharing are given both the method to, and the burden of, setting alternative expectations.[414] Failure to act affirms the normative partnership.

Hussey and its progeny embrace heightened expectations of the marital partnership and notions of sharing. If Karl Llewellyn was correct about how divorce laws reflect our notions about marriage,[415] these cases place the state of marriage in good stead. To the extent that laws project a desired set of norms and values, and influence our expectations within marriage, these cases set our sights in the right direction. Most would agree that we continue to idealize marriage and families as core vessels for love, nurturance and mutual obligation, and should permit spouses to hold each other to standards of behavior consistent with this ideal. A model that strives to hold this ideal as its premise cannot be too far afield.

Bred from this ideal, Hawai'i's incarnation of the marital partnership model serves as a vehicle for redistributing property to spouses who may have come into the marriage with relatively few assets or who, because of primary caregiving duties within the marriage, developed a lesser capacity for acquiring wealth independently. This is the model's remedial aspect. With this in mind, we close with two cautionary notes, or perhaps, reminders.

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[413] *See Hussey*, 77 Hawai'i at 206-07, 881 P.2d at 1274-75.

[414] However, should the norm of sharing and the expectations of the partnership model articulated in *Hussey* and its progeny govern marriages that preceded these opinions? For example, spouses who never anticipated these decisions, may not have thought to enter into a premarital agreement in order to exclude certain premarital properties. While the parties may have informally agreed to maintain separate estates and lives, the lack of a valid premarital agreement would appear to bar them now from asserting a result consistent with their earlier understanding. The concern is less for those who are willing to agree on a property division that is consistent with those early understandings. The problem is where the parties cannot agree in which case the partnership rules operate as a set of default provisions to produce a certain result.

Maybe the question begs another: are the expectations of Hawai'i's incarnation of the partnership model so reflective of commonly and deeply held beliefs that few could actually complain about retroactive applicability? Recall the supreme court's reference to a "*time-honored* proposition that marriage is a partnership." Cassiday v. Cassiday, 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986)(emphasis added).

[415] Or rather that "ideology of marriage" shapes divorce law. Llewellyn wrote: "(A)s we turn to review the changes occurring in the ways by which single marriages serve their radiant functions, we shall find also the social changes mirrored, distorted but unmistakable, in the rules and practice of marriage dissolution." Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 694 (1990).

First, are we excessively seeing things as we wish and not necessarily as they really are? The partnership model as finally operationalized in *Hussey* essentially provides another set of starting points that favor sharing.[416] This premise is a legitimate and good one in view of the altruistic and high-minded expectations most enter marriages with.

However, the cases that follow *Hussey* demonstrate a particularly strong tethering to the partnership template, even when facts suggest that the marriage at issue was not the equal sharing relationship contemplated by the partnership model. Thus, attempts to show that a marriage was an unrelenting episode of misery and isolation are foreclosed as an improper resort to fault-finding.[417] Likewise, the ICA has turned away attempts to show that a marriage ceased being a partnership prior to the divorce, relying on the 1988 supreme court decision of *Myers v. Myers*.[418] This tethering to partnership

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[416] Seen in another way, it provides a set of default provisions which looms over negotiating parties, serving a constant reminder of what the result might be if parties neither settle on an alternative vision nor convince a judge that a result other than one generated by partnership rules is appropriate.

[417] In *Jackson v. Jackson*, husband tried to prove that the marriage had been a short and unhappy one and that, in some important respects, the parties maintained separate lives. *See* Jackson v. Jackson, 84 Hawai'i 319, 333, 933 P.2d 1353, 1367 (Haw. Ct. App. 1997). The ICA rejected the relevance of the bitterness within the marriage, finding it to be an undue resort to fault-finding. *See id.* at 334, 933 P.2d at 1368. The court's long-standing policy has been to consider fault irrelevant unless it can be shown that a spouse's misconduct actually resulted in an erosion of the marital estate such as if one were to actively waste the estate in anticipation of a divorce. *See* Markham v. Markham, 80 Hawai'i 274, 280, 909 P.2d 602, 608 (Haw. Ct. App. 1996).

A small but growing call for the return of fault-based divorce as a response to the alleged failure of no-fault divorce to eliminate the pain or bitterness of marital breakdown has occurred in the past few years. *See* John Leland, *Tightening the Knot*, NEWSWEEK, Feb. 19, 1996, at 72-73; Joe Frolik, *Broken Homes: Our Ideas On Divorce May Be Wrong*, HONOLULU STAR BULLETIN, Sept. 23, 1995, at B-1. Notwithstanding the growth of this movement, one must ask whether we can and should isolate the role of fault in property division from the concern for re-erecting fault as a barrier to divorce. *See generally* Morse, *supra* note 21.

[418] In *Markham v. Markham*, the ICA stated:

> (W)e observe that the family court's use of the separation date as the termination point of the marriage relationship for the purpose of property division is incorrect. Under the 'partnership model of marriage we have accepted[,]' a "final division of marriage property can be decreed only when the partnership is dissolved" and not "after a declaration by either [spouse] that the marriage has ended[.]" Hence, the termination point of the marriage partnership for purposes of property division is the conclusion of the divorce trial.

80 Hawai'i at 286-87, 909 P.2d at 614-15 (quoting Myers v. Myers, 70 Haw. 143, 154, 764 P.2d 1237, 1244 (1988)).

The court, however, provided a safety valve by adding the following:

> However, any award based on property acquired by a spouse or the appreciation of property between the date of the parties' separation and the conclusion of the divorce trial

principles would also explain the court's reluctance to recognize "spots" of unpartnerlike behavior as a basis for awarding pieces of property to the owners [419] Thus, whether looking at the whole marriage, periods within the marriage, or conduct related to certain properties, the ICA has insisted on its vision of marriage as a collaborative partnership, setting an ostensibly high bar against rebuttal.[420]

While the remedial and redistributive character of the partnership model might continue to justify this insistance, the court must be careful that its reliance on fiction, no matter how noble its reasons are, adheres sufficiently to the facts and circumstances within a particular marriage and to community notions of fairness. To do otherwise would seriously undermine confidence in the court and its decisions,[421] and may exceed the supreme court's intent in allowing the partnership model to guide divorce-related property division.[422]

Because it is the redistributive character of the partnership model that in part fuels its existence, attention needs to be given to whether it actually achieves its purposes. This raises the second note of caution. Commentators have written on the perceived failures of the partnership model to achieve

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is a matter left to the court's discretion in determining what "may or may not be just and equitable when all the circumstances are considered."

Id. at 287, 909 P.2d at 615 (quoting *Myers*, 70 Haw. at 154, 764 P.2d at 1244).

[419] *See, e.g.*, Epp v. Epp, 80 Hawai'i 79, 92-93, 905 P.2d 54, 67-68 (1995); *Jackson*, 84 Hawai'i at 333, 933 P.2d at 1367.

[420] The current edition of the Hawaii Institute for Continuing Legal Education's ("HICLE") *Hawaii Divorce Manual* (5th ed., 1996) contains a section entitled "Summary of the Law" written by William Darrah, Esq. Darrah listed twenty-one circumstances in which appellate courts have determined that a deviation from partnership principles was or was not proper. These were culled from cases spanning the period of 1980 to 1996. This relatively small number of circumstances can be reduced to categories such as "Economic Misconduct and Waste," "Acting Like Non-Partners," "Income Opportunities," "Spousal Contributions/Non-Contributions," and "Invading Categories in the Name of Sharing." A review of these strongly indicates the ICA's reluctance to deviate from the partnership model, at least when parties seek to deviate on grounds of unpartnerlike behavior or over/under contribution to a particular property. *See* 1 HICLE HAWAII DIVORCE MANUAL 1-16 to 1-18 (1996).

[421] Not to mention making it difficult for practitioners to explain the law to unconvinced clients.

[422] The thrust of the supreme court's position in both *Gussin v. Gussin* and *Tougas v. Tougas* was the preservation of trial judge discretion as mandated by Hawai'i Revised Statutes section 580-47. *See* Gussin v. Gussin, 73 Haw. 470, 478-86, 836 P.2d 484, 488-92 (1992); *see also* Tougas v. Tougas, 76 Hawai'i 19, 26-28, 868 P.2d 437, 444-46 (1994). That the court added (arguably as dicta) its acceptance of the partnership model to its analysis came as a rather lukewarm response to the ICA's insistence for some kind of guidance in divorce-related property division. *See Gussin*, 73 Haw. at 486, 836 P.2d at 492; *see also Tougas*, 76 Hawai'i at 27-28, 868 P.2d at 445-46. An overzealous application of partnership-based rules during the post-*Gussin-Tougas* period may be viewed by the Hawai'i Supreme Court as an undue restriction upon the statutory discretion of trial judges.

economic equity among divorcing parties.[423] The focal point of these attacks has been the inadequacy of the model's response to the plight of the spouse who bore the primary caregiving responsibilities in the marital home and irretrievably lost earning opportunities and capacity as a result.[424]

Different mechanisms have been suggested to achieve more equitable results.[425] Some have suggested some form of increased sharing of post-divorce income to take into account the one source of wealth—the primary wage earner's earning capacity —which may have significantly increased but

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[423] *See, e.g.*, Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 553-60 (1990); Smith, *supra* note 415, at 730-40; Reynolds, *supra* note 209, at 896; Starnes, *supra* note 5, at 108-11.

[424] In Hawai'i, a study was done by Heather Hammer, Ph.D. to determine the economic impact of divorce. Looking at two random samples (in one sample, alimony was awarded, in the other, no award was made) of 1989 divorce cases from the family court on the island of Oahu, Hammer sought to measure the economic well-being of divorcing parties during the marriage, at the time of divorce, during the period immediately following the divorce, and at apoint four years post-divorce. Information for the latter period was to be culled from a subsequent questionnaire mailed to the participants of the study in January 1994.

Hammer produced a preliminary report which detailed the first phase of the study. *See* HEATHER HAMMER, THE ECONOMIC IMPACT OF DIVORCE IN HAWAII-PRELIMINARY REPORT FOR PHASE I OF THE STUDY (1993)(copy on file with author). Phase II was to look at the period four years after the divorce. However, because most of the 1994 questionnaires were not returned and many of the original participants could not be located, drawing statistically valid results was impossible. Interview with L. Dew Kaneshiro, Project Director of the Equality and Access to the Courts Project, Office of the Administrative Director, Hawai'i State Judiciary (June 2, 1997).

The Phase I report was nonetheless revealing. It found that consistent with the research findings in other jurisdictions, the per capita family income of women declined significantly post-divorce and that the per capita family income of men increased. *See* HAMMER, *supra* at 5. In the Alimony Sample (i.e., where alimony was awarded to the woman), per capital family income declined to 76.3% of their pre-divorce per capita income level. *See id.* at 6. In the Non-Alimony Sample, the dip was to 79.2% of the pre-divorce value. *See id.* In contrast, men in the Alimony Sample, enjoyed an average increase of 137.8% of their pre-divorce per capita family income; for the Non-Alimony Sample, the increase was similar. *See id.*

Hammer also looked at the redistribution of net real property values among the divorcing parties. There she found that certain groups of individuals, most often comprised of women, experienced decreases from the pre-divorce levels. *See id.* at 10. Of 17 groups with significant declines in net real property values, 13 groups were comprised of women. *See id.* Groups of women bore 76.5% of all significant declines. *See id.*

At the time the research sample was developed (1989), the partnership model was already functionally in place. Thus, the results may have some nexus to the effectiveness of the model. In any case, the results are troubling. No attempt was made to explain why the results turned out the way they did. On the other hand, one might ask: "Are women faring better under the model than without it?" Not that an affirmative answer would make things better, but it would suggest that the model is a proper forward step upon which to pause and ponder the next step.

[425] *See supra* note 423.

not in an always visible way.[426] While on one hand, this may harken back to the days when one spouse was dependent upon the other, it also recognizes the choices that the caregiving spouse made and avoids penalizing her for having made them.[427] The "clean-break"[428] thrust of the UMDA remolded our thinking about alimony, reducing it largely to a rehabilitative function.[429] If the court is in fact interested in wealth redistribution that accounts for sacrifices in earning capability made by familial caregiving spouses, it must continue to consider the role of post-divorce income sharing as an adjunct to the partnership model.[430] In doing so, the court should recognize that some level of an individual's post-divorce need or loss may forever be rooted in the now-dissolved marriage and that "clean break" notwithstanding, the party in a better financial position may have an obligation that goes beyond a period of rehabilitation.[431]

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[426] *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 63-67 (1996).

[427] *Cf.* Stephen D. Sugarman, *Dividing Financial Interests on Divorce, in* DIVORCE REFORM AT THE CROSSROADS 130, 144-45 (Stephen D. Sugarman & Herma Kay Hill eds., 1990)(describing how certain divorce rules might be desirable to help couples arrange for their preferred allocation of marital roles).

[428] "Clean break" refers to the finality sought in the break up of a marriage. *See* Brinig, *supra* note 7, at 107.

[429] *See* Regan, *supra* note 37, at 2314-15.

[430] This does not disregard the fact that between divorcing parties, there is often too little income and too few assets to ensure even minimal economic comfort much less an approximation of the standard of living to which the parties became accustomed during the marriage. But to the extent possible, property and income should both be on the table when it comes to looking at what is available to meet needs and compensate loss attendant to the divorce.

[431] We already see this in cases where the marriage was lengthy and the homemaker spouse was in no position to achieve a level of rehabilitation that could help her approach the standard of living to which she was accustomed. But even for an individual who continues to maintain primary child care and homemaking responsibilities while independently achieving a modicum of self-sufficiency and wealth, there may be justification to continue some form of income sharing as a fair reflection of an otherwise unrecoverable earning capacity (and of the increased earning capacity of the party who had been the primary wage earning spouse) linked to the decision to "tend the hearth" during the marriage.

The American Law Institute ("ALI") is currently working to finalize its *Principles of the Law of Family Dissolution: Analysis and Recommendation* (hereinafter "Principles"). In recognition of the fact that one divorcing party may have suffered an otherwise uncompensated loss arising from the marriage, the proposed final draft of the ALI's Principles sets forth a chapter entitled "Compensatory Spousal Payments" that goes beyond our current understanding of need-based alimony. The chapter recharacterizes a proper remedy as "compensation for loss" rather than "relief of need." A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS at 261 (Tentative Draft No. 1, Mar. 15, 1995). This reconceptualization would justify a compensatory award even where the recipient did not demonstrate a need. The award would respond not to a plea of need but a claim to entitlement. *See id.* at 262.

V. CONCLUSION

The partnership model encapsulates a well-accepted ideal of marriage to form a response to the challenge of fairly dividing property without undue emphasis on whose name is on the title, or who contributed the funds to acquire it. It recognizes that important contributions come in more than monetary forms and that they often represent an accumulation of small, mundane efforts that fuel a marriage and family life. Thus, it justifies equal distributions of the marital estate even to spouses who stayed at home and managed the domestic sphere. In Hawai'i, the model is particularly designed to favor the marital estate and compels a party to affirmatively exclude property from the marital partnership. The fact that it may not actually accomplish its remedial goals or that it may be imposed on marriages that never operated on the premises of the model (i.e., were not partnerships) should provide at least two foci for further examination.

Although not perfect, Hawai'i's partnership model provides a good conceptual framework to guide the work of the courts. It represents a modern development in the long and ongoing movement away from firmly entrenched patriarchal norms which engulfed Hawai'i soon after the arrival of the missionaries in 1820. It is possible because of evolving social processes, the same processes that will no doubt require retooling at a later time.

Professor Kastely said the following in an address to the Family Law Section of the Hawai'i State Bar Association soon after the *Gussin* decision: "The challenge of *Gussin* is the persistent, the permanent challenge of the common law—to develop open and flexible ways to articulate the response to the genuine claims of justice made by individuals."[432] If applied with a reasoned hand, the partnership model can provide one such response.[433]

Under the ALI's proposed principles, compensatory losses could include (1) an earning capacity loss incurred during marriage and arising from one spouse's disproportionate share of the care of children or to other individuals such as elderly relatives, (2) a loss which a spouse incurs when a marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity and (3) in the case of a long marriage, a loss in living standard experienced at divorce by the spouse who has less wealth or earning capacity. *See id.* at 271-72.

[432] Yamauchi, *supra* note 16, at 451.

[433] *Author's note:* Just prior to publication, the ICA reported several additional decisions that reflect its continued regard for the partnership model. These include *Whitman v. Whitman,* No. 20570 (Apr. 21, 1998) *Kuroda v. Kuroda,* No. 18913 (May 19, 1998) and *Wong v. Wong,* No. 19721 (May 22, 1998).